2019

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 175.

HENRY H. BOCKFINGER, APPELLANT,

vs.

JOHN W. FOSTER, W. S. ROBERTSON, AND A. C. SCHNELL, TRUSTEES OF TOWNSITE BOARD No. 6, OKLAHOMA TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED OCTOBER 18, 1909.

(16,289.)

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(18,289.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 15, 1902.

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Print

a UNITED STATES OF AMERICA, ss:

The President of the United States to John W. Foster, W. S. Robertson, A. C. Schnell, and Horace Speed, their attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, within thirty days from the date of this writ and on the 5th day of October next, pursuant to an order allowing an appeal entered in the clerk's office of the supreme court of the Territory of Oklahoma, wherein the said Henry H. Bockfinger is plaintiff in error, and the said John W. Foster, W. S. Robertson and A. C. Schnell as trustees of Townsite Board No. 6, Oklahoma Territory, are defendants in error, to show cause, if any there be, why the judgment, as in the said order allowing an appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 5th day of September, A. D., 1901, and of the Independence of the United States of America one hundred and twenty-six.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of Oklahoma.

[Seal Supreme Court, Territory of Oklahoma.]

Attest: BENJ. F. HEGLER,
Clerk Supreme Court.

b Service of the foregoing citation is hereby accepted this 21st day of September, 1901.

HORACE SPEED,
Attorney for Defendants in Error, John W. Foster, W. S. Robertson, and A. C. Schnell, as Trustees of Townsite Board Number Six, Oklahoma Territory.

c [Endorsed:] 367. H. H. Bockfinger, pl'ff in error, *vs.* Jno. W. Foster, *et al.*, def'ts in error. Citation on appeal and acceptance of service thereof. Filed Sep. 21 1901 Benj. F. Hegler, clerk supreme court.

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[SEAL.] *Clerk Supreme Court.*

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Attorney for Defendants in Error, John W. Foster, W. S. Robertson, and A. C. Schnell, as Trustees of Townsite Board Number Six, Oklahoma Territory.

Endorsed on back as follows, to wit: 367 H. H. Bockfinger, plaintiff in error, *vs.* Jno. W. Foster, *et al.*, defendants in error. Citation on appeal and acceptance of service thereof. Filed Sept. 21, 1901 Benj. F. Hegler, clerk supreme court.

1 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, *Territory of Oklahoma,* } *ss:*

Be it remembered, that on the eleventh day of September, 1895, there was filed in the supreme court of said Territory, in the office of the clerk thereof, a petition in error with the case-made thereto attached, in the cause of Henry H. Bockfinger, plaintiff in error, *vs.* John W. Foster, W. S. Robertson and A. C. Schnell, trustees of the Townsite Board No. 6, Oklahoma Territory, defendants in error, and numbered 367; which said petition in error and case-made,* together with the endorsements thereon are in the words and figures following, to wit:

* NOTE.—The bound copy of Exhibit "A" of said case-made, being very voluminous, is placed for convenience of binding, at the end of this record.—CLERK.

2 In the Supreme Court of the Territory of Oklahoma.

HENRY H. BOCKFINGER, Plaintiff in Error, *vs.* JOHN W. FOSTER, W. S. ROBERTSON, and A. C. Schnell, Trustees of Townsite Board Number Six, Oklahoma Territory, Defendants in Error.	No. 367. Petition in Error.

The said Henry H. Bockfinger, plaintiff in error, complains of said defendants in error for that the said defendants in error, at the September, 1894, term of the district court of Logan county, Oklahoma Territory, recovered a judgment by the consideration of said court against the said Henry H. Bockfinger, plaintiff in error, in a certain action then pending in the said court, wherein the said Henry H. Bockfinger was plaintiff, and the said John W. Foster, W. S. Robertson and A. C. Schnell, trustees Townsite Board Number Six, Oklahoma Territory, were defendants. A certified transcript of the record of said court is hereunto attached, marked "Exhibit A" and made a part of this petition in error; and the said Henry H. Bockfinger plaintiff in error, avers that there is error in the said record and proceedings, in this, to wit:

First. Said court erred in sustaining the demurrer of the defendants in error to the complaint of the plaintiff in error.

Second. Said court erred in rendering judgment upon said demurrer that the plaintiff in error take nothing against the defendants in error, and that said defendants in error recover of the plaintiff in error their costs.

3 Third. Said court erred in not overruling said demur-er filed by defendants in error to the complaint of plaintiff in error, in the court below.

Fourth. Said court erred in not rendering judgment for the plaintiff in error on the pleadings.

Wherefore, the plaintiff in error prays that said judgment so rendered, be reversed, set aside and held for naught, and that a judgment be ordered to be rendered in favor of the plaintiff in error upon said demurrer, and overruling said demurrer, and that the plaintiff in error be restored to all the rights he has lost by such ruling on said demurrer, and by the rendition of said judgment, and that the cause be remanded for such further proceedings, as the condition of the record shall warrant, and for such further relief as to the court may seem just and proper.

(Signed) KEATON & COTTERAL,
Attorneys for Plaintiff in Error.

Endorsed: Filed Sept. 11", '95 Edgar W. Jones, clerk sup. court.

4 *Transcript of Record.*

EXHIBIT A.

5 TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

In the District Court of Logan County of the First Judicial District in and for Oklahoma Territory.

HENRY H. BOCKFINGER, Plaintiff,
vs.
JOHN W. FOSTER, W. S. ROBERTSON, and A. C. SCHNELL, Trustees of Townsite Board Number Six, Oklahoma Territory, Defendants. } Complaint.

Comes now Henry H. Bockfinger, the plaintiff in the above-entitled cause and for his complaint against the defendants therein named alleges:

That John W. Foster, W. S. Robertson, and A. C. Schnell are the trustees of Townsite Board Number Six (6), duly constituted and appointed by the Secretary of the Interior as such trustees and assigned to *to* the townsite of West Guthrie, which board of trustees have acquired the legal title to the west half of section eight (8) in township sixteen (16) north of range two (2) west, in Logan county, Oklahoma Territory.

That the plaintiff, Henry H. Bockfinger is and at all times hereinafter stated was a native-born citizen of the United States of America, over twenty-one (21) years of age, and has never heretofore had the benefit of his homestead right under the laws of the United States; and the said Henry H. Bockfinger is and at all times hereinafter stated was qualified to make entry of lands under the homestead laws of the United States, in the Territory of Oklahoma.

That on the 22nd day of April, 1889, the southwest quarter
6 of section eight (8) in township sixteen north of range two (2) west, was unappropriated public land of the United States, subject to homestead entry. That on said day, one James W. Feagins made settlement on the said southwest quarter of section eight (8), in township sixteen (16) north of range two (2) west, and on the 23rd day of April, 1889, made homestead entry number seventeen (17) upon said tract of land at the United States land office at Guthrie, Oklahoma.

That on May 8", 1889, J. M. Patterson filed a contest affidavit against the said Feagins' entry, alleging that the said James W. Feagins was disqualified from making homestead entry of said land for the reason that the said James W. Feagins was within said Territory in violation of law and of the proclamation of the President of the United States opening said Oklahoma lands to settlement, and that he entered and occupied said lands prior to the time fixed by law.

That on the 8th day of May, 1889, one Ezra Maples filed a contest affidavit against the said homestead entry of the said James W. Feagins, alleging his, the said Maples' settlement on said tract of land on the afternoon of said April 22, 1889, and also that the said James W. Feagins and the said J. M. Patterson entered upon and occupied lands in Oklahoma Territory, in violation of the President's proclamation, prior to the hour and the time fixed by law for the opening of the same.

That on the 24th day of May, 1889, the plaintiff herein, Henry H. Bockfinger, filed his affidavit of contest against the said James W. Feagins' homestead entry, alleging the disqualification of the said James W. Feagin under the law to make the same and that he, the said James W. Feagins, as well as the said J. M. Patterson and the said Ezra Maples, had entered upon and occupied lands in Oklahoma Territory in violation of law and of the President's proclamation, and prior to the time fixed by law for the opening of the
7 same. The said plaintiff, Henry H. Bockfinger, also on the 20th day of April, 1890, made settlement upon said southwest quarter of section eight (8) township sixteen (16) north of range two (2) west, under the homestead laws of the United States and claimed the same as his homestead and has ever since resided upon, occupied, cultivated and improved the same in all respects as required by law and he has made lasting and valuable improvements thereon to the extent and of the value of three hundred ($300.00) dollars and more.

Plaintiff further alleges that on June 19, 1889, an application was filed at the United States land office at Guthrie, Oklahoma to enter the west half of section eight (8), township sixteen (16) north of range two (2) west, as a townsite of West Guthrie, by parties claiming to represent the settlers thereon.

That the Hon. Commissioner of the General Land Office on October 23, 1889, ordered a hearing in said matter relating to said tract of land, with the following directions and instructions to the register and receiver of the said Guthrie land office, in relation thereto, to wit:

"I therefore hereby direct that you order a hearing pursuant to the rules of practice to determine whether or not there is more than one town on the two sections of land covered by the above-mentioned application, *when said land was first actually selected and occupied as a townsite or townsites as the case may be, and the number of inhabitants, character and location of all municipal improvements thereon both at the dates of filing said applications and the date of hearing. Also to determine whether the appellants established settlements on the lands they sought to enter, and if so the date thereof.*"

To these subjects was added a further theme of inquiry in said letter of October 26, 1889 in this language: "*The object of this hearing is certainly to determine the right of the townsite claimants, and I hereby direct that the only question you should inquire into in addition to those mentioned in my former letter is the qualifications of the homesteaders as such at the time of making their entries.*"

That in pursuance to said directions and instructions, of the Hon. Commissioner of the General Land Office, a hearing was had in said

cause, at which hearing the townsite settlers of West Guthrie by their representatives appeared as plaintiffs, and this plaintiff
8 appeared as one of the defendants as to said southwest quarter of section eight (8), but that the said contestant James M. Patterson did not appear, but made default, and said Ezra Maples thereafter made default and failed to defend or prosecute his interests in said cause, and said contest was prosecuted wholly against the said James W. Feagins and the plaintiff, Henry H. Bockfinger, herein as to the southwest quarter of section eight (8), in township sixteen (16), north of range two (2) west, and at said hearing, evidence and testimony was taken, a true copy of which is hereto attached, marked "Exhibit A" and made a part of this complaint, and said Exhibit A comprises and constitutes all of the evidence in said cause.

That thereafter on the 4th day of November, 1890, the local land office, at Guthrie, Oklahoma, the register and receiver thereof, rendered a decision in said cause. A true and correct copy of which decision is hereto attached and marked "Exhibit B" and made a part of this complaint.

That upon the testimony taken at said hearing, the local officers found that the said James W. Feagins was disqualified as a homestead settler and recommended his entry for cancellation. They also found that at three (3) o'clock p. m. of said 22nd day of April, 1889, the east half of said section eight (8), and the west half of section nine (9), township sixteen (16) north of range two (2) west, Logan county, Oklahoma Territory, was settled upon by several thousand people, for the purpose of business and trade as a townsite, and about four o'clock p. m. of said day, one hundred and fifty to two hundred people crossed the Cottonwood creek at points on the northeast quarter of the southwest quarter of section eight (8), township sixteen (16), north of range two (2) west, and staked off lots on the said northeast quarter of the southwest quarter and also upon the northwest quarter of said section eight (8), and also upon that part of the N. E. ¼ of section eight (8), which lies west of said Cottonwood creek, embracing about one hundred (100) acres of said northeast quarter of said section eight (8), township sixteen (16) north,
9 of range two (2) west, and that on the evening of said April 22, 1889, said people held a mass meeting and organized a town to be known as West Guthrie, and on that day and the following immediate days, the said townsite had the northwest quarter of said section eight and the said one hundred (100) acres of the said northeast quarter of said section eight (8), and the northeast quarter of the southwest quarter of said section (8), township sixteen (16) north of range two (2) west, surveyed into lots, blocks, streets, and alleys, and occupied the northwest quarter of said section eight (8), township sixteen (16),north of range two (2) west, and made improvements thereon and also the northeast quarter of the southwest quarter of said section eight, as a townsite.

The said local office at the same time found that no improvements or settlement or occupancy had up to that time, December 4, 1890, been made on the west half of the southwest quarter, and the south-

east quarter of the southwest quarter of section eight (8), for townsite purposes by the said townsite of West Guthrie, and awarded the said northwest quarter of section eight (8), and the northeast quarter of the southwest quarter of said section eight (8), township sixteen (16) north of range two west, to the said townsite board of West Guthrie, and the other said one hundred and twenty (120) acres of said southwest quarter of said section eight (8), to the homestead settlers to be determined at a future hearing.

That in due time and as required by law, this plaintiff Henry H. Bockfinger appealed to the Hon. Commissioner of the General Land Office, from that part of the said decision which found and held that the northeast quarter of said southwest quarter of said section eight (8), township sixteen (16) north of range two (2) west, had ever been settled upon, occupied, surveyed, platted or improved in any way, and also from that part of the said decision which held that the said townsite had ever claimed any part of said southwest quarter of section eight (8), prior to June 19, 1889, and from that part of said decision which awarded said northeast quarter of said southwest quarter of section eight, to the said townsite.

10 The plaintiff further alleges that no appeal was ever taken from the decision of the said Guthrie land office, which found that the townsite had never settled upon, improved or occupied the said west half of the southwest quarter and the southeast quarter of the southwest quarter of said section eight (8), township sixteen (16) north of range two (2) west, for townsite purposes and which awarded said one hundred and twenty (120) acres of land to the homestead settlers. The plaintiff says that part of said decision became and forever thereafter was final.

The plaintiff further alleges that thereafter on the 4th day of August, 1891, the Commissioner of the General Land Office at Washington, D. C., made and rendered his findings and decision in said cause, a true copy of which is hereto attached, marked "Exhibit C" and made a part of this complaint.

The plaintiff further alleges that on the — day of —— 1891, and in the time prescribed by law and the rules of the Department of the Interior relating thereto, this plaintiff appealed from the said decision of the Hon. Commissioner of the General Land Office to the Secretary of the Interior, upon all matters of law and fact found against the said Henry H. Bockfinger, or which in any way affected his rights in said cause, or made any finding or award in favor of the townsite settlers of West Guthrie.

That thereafter and on the 16th day of December, 1891, the Secretary of the Interior in said cause made and rendered his findings and decision therein. A true and correct copy of which is hereto attached, marked "Exhibit D" and made a part of this complaint.

The plaintiff further alleges that thereafter and on the 3rd day of October, 1892, the Secretary of the Interior made and rendered his decision upon the review in the said cause. A true and correct copy of which is hereto attached, marked "Exhibit E" and made a part of this complaint.

The plaintiff further alleges that from the actual facts in

said cause and the facts shown in said cause at the hearing
11 therein and from the undisputed facts in said cause, the townsite settlers of West Guthrie never made any settlement or occupancy on any part of the said southwest quarter of section eight (8), township sixteen (16), north of range two (2) west, until long after the 24th day of May, 1889, when the rights of this plaintiff as a contestant and as a settler and occupant attached to said land.

That the findings of the local land office and of the Hon. Commissioner of the General Land Office and of the Hon. Secretary of the Interior, against the plaintiff and against the claimants and in favor of the townsite settlers and to the effect that said townsite settlers had settled upon, occupied, improved, surveyed or claimed any part of the southwest quarter of said section eight (8) prior to or on May 24, 1889, or prior to the claim of Henry H. Bockfinger were all procured by fraud, by imposition, and by perjury and by deceit practiced by the said townsite settlers of West Guthrie and their attorneys and agents upon this complainant, Henry H. Bockfinger, and that all of the evidence, if any there is or was in said record which tended to show any claim or occupancy of said southwest quarter of said section (8), township sixteen (16) north of range two (2) west prior to or on May 24th, 1889, or prior to the vested right and claim of this plaintiff as a settler and contestant upon said tract of land, were all false, fraudulent and impositious and made for the purpose of deceiving the local office and the Land Department concerning the case and which did deceive the local office and the Land Department, including the Secretary of the Interior, and did induce them and procure them to render said decisions and findings in all respects, in so far as they found or held against this plaintiff, and that, but for said fraud, falsehood, perjury, and deceit, the findings and rulings of all of said officers and departments would have been in a favor of this plaintiff.

The plaintiff further alleges that all of the maps, plats and records introduced in said cause by said townsite of West Guthrie were false and fraudulent and were not actual and *bona fide*
12 records but were plats and records made for the purpose of deceiving the local land office at Guthrie, and the General Land Office and the Department of the Interior, and were not actual records of acts and facts done by the townsite settlers of West Guthrie.

That no survey was ever made at any time by the townsite settlers of West Guthrie of the said southwest quarter of said section eight (8), or any part thereof, into lots, blocks, streets, or alleys, or in any other mode or manner whatever. That the plaintiff, Henry H. Bockfinger, settled upon, occupied, and improved the said northeast quarter of the southwest quarter of said section eight, township sixteen north of range two (2) west, on the 20th day of April, 1890, and has ever since resided upon, occupied, and improved the same, for the purpose of and with the intention of entering as a homestead the said southwest quarter of section eight (8), township sixteen (16) north of range two (2) west, and the said Henry H. Bockfinger is the only person who occupied, settled upon and improved

said northeast quarter of the southwest quarter of said section eight (8), township sixteen (16), north of range two (2) west, in good faith until after the 16th day of December, 1891, and that there was no townsite settlement or occupancy or improvements for townsite purposes upon the said southwest quarter of section eight, until after the 16th day of December, 1891, and the said land was never settled upon or occupied except by homestead claimants until after said 16th day of December, 1891, after the decision of the Secretary of the Interior as before stated.

That on the 16th day of December, 1891, after the decision of the Secretary of the Interior as before stated, the said lands, the southwest quarter of section eight (8) was then and there without the procurement of the plaintiff, included within the corporate limits of the city of Guthrie, Logan county, Oklahoma Territory, the same being a municipal corporation, a city of the first class under the laws of the Territory of Oklahoma, and on said day, the city council of the municipal corporation of the city of Guthrie, recog-
13 nizing the fact that there had never been any settlement or occupancy of the said west half and the southeast quarter of the southwest quarter of said section eight (8), for townsite purposes, made and passed in proper council meeting the following resolution, to wit:

"*Resolved, That the west half and the southeast quarter of the southwest quarter of section No. (8) eight, township No. (16) sixteen north of range No. two (2) west of the Indian meridian, which is part of the city of Guthrie, be, and the same is hereby, reserved and set apart for public purposes of said city.*"

Resolution adopted.

That said resolution was passed by the said city council by the procurement and at the request of said townsite settlers through their agents and particularly at the request and desire of Charles Brown, who was then and there and had prior to that time long been and since that time has been the attorney for the said townsite settlers of West Guthrie, and the attorney of record for the said townsite settlers in said cause. That the alleged townsite settlers of West Guthrie participated in the election of the mayor and councilmen of the said city of Guthrie, composing the mayor and city council of the said city of Guthrie, on the said 16th day of December, 1891, when said resolution was passed and the said townsite settlers of West Guthrie were at that time a part of the city of Guthrie, Logan county, Oklahoma Territory, by their own procurement and their own request, and the said city council and mayor and the said Charles Brown were at that time acting for and on behalf of the said townsite settlers of West Guthrie, and performed their wish and desire in the premises. That said resolution was recorded and was a public official recognition of the well-known fact and up to that time, and always and ever the undisputed fact that said land therein described, the west half and the southeast quarter of the southwest quarter of section eight (8), township sixteen (16) north of range two (2) west described in said resolution had never prior to that time been settled upon, occupied or surveyed by said townsite settlers or any

townsite settlers of West Guthrie, or any other townsite. That said resolution was not made and passed by the procure-
14 ment or by the consent of this plaintiff.

The plaintiff further alleges that on the — of ——, 1892, he made a motion for a rehearing of his said cause before the Secretary of the Interior in order that he might show the facts and the undisputed facts of said cause, and in order that he might show that all of the testimony and evidence offered by the said townsite settlers which in any way tended to prove their claim to the said southwest quarter of said section eight, township sixteen (16) north of range two (2) west, was false, fraudulent and manufactured testimony and evidence and made for the purpose of deceiving the Land Office and the Department of the Interior and for the purpose of depriving this plaintiff of his vested right to said tract of land, and in support thereof he filed with the said Secretary of the Interior the affidavits of N. A. Haight, J. D. Furber, James Feagins, C. H. Griffith, James Dooley, C. H. Cannon, James Stewart, and of the said H. H. Bockfinger; and this plaintiff used every means in his power to get the Secretary of the Interior to correct the mistakes which he had made in his findings and decision and in awarding the said tract of land to said townsite settlers of West Guthrie.

But the plaintiff alleges that the said Secretary of the Interior in his original decision in this cause and in his decision upon the review and on the rehearing made October 3′′, 1892, as hereinbefore set forth, acted arbitrarily, tyrannically, inequitably, unjustly, and without a consideration of either the facts or the law in said cause, and with a prejudice and with a determination in disregard of the facts and the law to award said tract of land to the townsite settlers of West Guthrie, and that the said Secretary of the Interior refused to consider said affidavits of said various named parties. Copies of which affidavits the plaintiff attaches hereto, marks "Exhibit F," and makes the same a part of this complaint. That the said Sec-
15 retary of the Interior refused to give to this plaintiff a hearing thereon in order that the facts of the case might be shown, determined and found.

The plaintiff alleges that the Commissioner of the General Land Office and the Secretary of the Interior erred and made mistakes which has prevented the plaintiff from getting title to this land, upon both matters of fact and of law. That the facts in said case and the undisputed facts show and are that the townsite settlers of West Guthrie never settled upon, occupied, surveyed, claimed or improved any part of the said southwest quarter of section eight (8), township sixteen (16) north of range two (2) west until long after May 24th, 1889, and the Secretary of the Interior and the Commissioner of the General Land Office, from the record in said cause should have so found, and that the Commissioner of the General Land Office and the Secretary of the Interior never had any jurisdiction, power or authority to find or award the west half of the southwest quarter, or the southeast quarter of the southwest quarter of said section eight (8) to the townsite settlers of West Guthrie, for the reason that all of the evidence in said cause and the undisputed

facts of said cause show and are that the townsite settlers of West Guthrie never occupied, settled upon or in any way improved said one hundred and twenty acres of said quarter section of land, and for the further reason that the said Commissioner of the General Land Office and the Secretary of the Interior never had any jurisdiction, power or authority to find that the townsite settlers of West Guthrie had ever occupied, improved, or claimed said one hundred and twenty (120) acres of land a part of said southwest quarter of section eight (8), township sixteen (16) north of range two (2) west, because the townsite settlers of West Guthrie never appealed from the findings and award of the local land office at Guthrie, Oklahoma Territory, awarding the west half and the southeast quarter of the southwest quarter of said section eight (8), township sixteen (16) north of range two (2) west, to the homestead settlers in said cause and said findings and the award of the said local land office
16 were and always have been final and conclusive as to the said one hundred and twenty acres of said land because of the failure of the townsite settlers of West Guthrie to appeal from the said findings and award of said local office.

The plaintiff further alleges that the said Commissioner of the General Land Office and said Secretary of the Interior erred in their holdings as to the law governing said cause and the rights of this plaintiff to said tract of land, and in holding that the original Oklahoma act provided for townsite entries not to exceed three hundred and twenty (320) acres, but no provision was made as to the proper method of making such entries, and the act of May 14, 1890, relieved this question and ratified the applications then pending, and although the town did not at the date of said application (June 19, 1889) cover or occupy each legal subdivision, the occupation of any portion of the land selected and settled upon by one hundred people or more warranted the selection of three hundred and twenty acres, and the consequent withdrawal of the entire tract, and that up to and prior to the act of May 14, 1890, settlement by one hundred persons on any portion of this land was sufficient to warrant a townsite application for the entire west half of said section eight (8), when in truth and in fact, as plaintiff alleges, the law was and always has been that townsite occupants must have settled upon, occupied and improved each legal subdivision of land which might have been claimed by them prior to the initiation of any adverse right thereto by any homesteader, which plaintiff alleges was not done in this case, but that the right of this plaintiff attached to said tract of land prior to the rights of the townsite settlers.

The plaintiff further alleges that the Secretary of the Interior erred in his conclusions of law in said cause in holding that under the townsite laws relating to Oklahoma Territory, the act of May 14, 1890, one hundred (100) or more people might select three hundred and twenty (320) acres of land in Oklahoma Territory, for a townsite, although they may not at the date of the selection of said townsite occupy the smallest subdivision thereof for municipal purposes and the said Secretary of the Interior erred in holding
17 that the said townsite settlers of West Guthrie could hold, under the law, all of said southwest quarter of section eight (8),

although they had never occupied, settled upon or improved the west half or the southeast quarter thereof prior to the said decision of the Secretary of the Interior and particularly long prior to the initiation of the vested right of this plaintiff to said tract of land by his acts as herein stated, and the said Secretary of the Interior erred in all of his findings of fact and in all of his conclusions of law, in so far as they relate to or affect the right of this plaintiff.

The plaintiff further alleges that the Secretary of the Interior should have awarded him a rehearing upon his application made in this cause, and his showing made therefor, but that he arbitrarily, tyrannically, unjustly and inequitably refused the same and left him without any remedy except by appeal to this court.

The plaintiff further alleges that there was no settlement upon, occupancy claim or selection for, or any act whatever done by any townsite settlers, body or organization of people for townsite purposes of the said southwest quarter of section eight (8), township sixteen (16), north of range two (2) west, before the homestead entry of the said James W. Feagins, made on the 23rd day of April, 1889, and that under the law, the said homestead entry of said James W. Feagins segregated said tract of land from the public domain and reserved the same from any settlement, or claim or entry except by contest as by law provided.

That, as before stated, on the 24th day of May, 1889, the said Henry H. Bockfinger did, as by law required, file his contest, duly sworn to and properly corroborated against the said homestead entry of the said James W. Feagins, in the United States Land Office at Guthrie, Oklahoma, which contest alleges that the said homestead entry of the said James W. Feagins was not a legal homestead entry and that the said James W. Feagins had entered the said Oklahoma lands in violation of law and contrary to the proclamation of the President opening said lands to settlement, and had entered
18 upon and occupied lands opened to settlement by the proclamation of the President of March 23, 1889, prior to twelve (12) o'clock noon, of April 22, 1889, and was therefore illegal and should be cancelled.

And the said contest of Henry H. Bockfinger also alleged the same disqualifications and invalidity on the part of the contestants J. M. Patterson and Ezra Maples, and the plaintiff, Henry H. Bockfinger, alleges that his was the first valid and legal contest against the said James W. Feagins' homestead entry, and that the contest of the said J. M. Patterson and Ezra Maples were wholly illegal and void because of the disqualifications of said parties to make said contest or acquire any interest in said tract of land by virtue of said contest.

The plaintiff alleges that he filed his said contest against the said entry of the said James W. Feagins, for the purpose of procuring the cancellation of the said homestead entry of the said James W. Feagins, and for procuring a preference right to enter said tract of land, the southwest quarter of said section eight (8), in township sixteen (16) north of range two (2) west, under the act of May 14, 1890,

and the plaintiff at that time made a deposit as required by the Land Department of five ($5.00) dollars, for costs on his said contest.

That under the law, the register and receiver of the land office at Guthrie, Oklahoma, should have ordered a hearing on his said contest against the homestead entry of the said James W. Feagins, his, the plaintiff's, being the only valid and legal contest against the said homestead entry, at which hearing the plaintiff would have had an opportunity to show, and would have shown, as is the fact and as has been found by the local office, the honorable Commissioner of the General Land Office and the Hon. Secretary of the Interior, that the said James W. Feagins was disqualified as aforesaid from
19 making said entry on said tract of land, and in which the plaintiff would have been awarded the said preference right to make entry of said tract of land.

That the plaintiff was at all times ready to pay the Land Office fees and expenses of said contest and for the procuring of the cancellation of the said homestead entry of the said James W. Feagins and that he has been deprived of his day in court by the said Land Office and by the said orders of the Hon. Commissioner of the General Land Office of October 23, and 26, 1889, hereinbefore on pages three and four of this complaint recited, and by the said Commissioner of the General Land Office improperly and illegally and not in accordance with law ordering a hearing on said application of the said townsite settlers to make entry of said land instead of upon the contest of this plaintiff, as by law required, and which he should have done, and under which, if the Hon. Commissioner had proceeded in accordance with law an award of the pre-reference right to make entry of said tract of land, and which the plaintiff alleges was a vested legal and equitable right to said tract of land, would have been awarded and given to this plaintiff. But the Hon. Commissioner of the General Land Office erred in the matter of law in not proceeding in said cause as herein stated by the plaintiff.

That at the hearing which was had in this cause, this plaintiff did pay the amount of his fees in his contest for said right to enter said land, and did pay for the procuring of testimony in support of the plaintiff's right of contest and his right to said tract of land, and did pay the expenses of procuring witnesses in support of his right to said tract of land and in support of his contest against the entry of the said James W. Feagins for said tract of land, and did pay his attorneys' fees in said cause and the various expenses, all amounting to the sum of more than eight thousand ($8,000.00) dollars and the said tract of land, the said southwest quarter of section eight (8) township sixteen (16), north of range two (2) west, is now of the value of more than fifteen thousand ($15,000.00) dollars.
20 The plaintiff further alleges that, as is shown by the findings in this cause of the various departments and as is the undisputed fact, the townsite of — Guthrie was initiated upon and attached to the east half of said section eight, township sixteen (16) north of range two (2) west, lying immediately east and adjoining the said southwest quarter of section eight (8) township sixteen (16) north of range two west immediately after noon of April 22, 1889,

and long prior to any claim by the townsite settlers of West Guthrie to the land in dispute in this cause, and that under the law, only said three hundred and twenty (320) acres of land, the said east half of section eight (8), township sixteen (16) north of range two (2) west could be taken for townsite purposes and that the said east half of section eight comprises fully three hundred and twenty (320) acres and that the entry therefor was made long prior to the entry of the west half of section eight as a townsite, the said entry and payment for the said east half of said section eight, as the townsite of Guthrie being made at the land office at Guthrie, Oklahoma Territory, on the 2nd day of August, 1890, and that when said entry was made, under the law no further lands could be entered for townsite purposes adjoining said lands.

That under the act of March 2, 1889, only three hundred and twenty (320) acres of land in Oklahoma Territory could be taken for townsite purposes, and the settlers of Guthrie on the afternoon of April 22, 1889, fully exhausted the right of townsite settlers to reserve land from homestead entry, by settlement and claim, which has since been consum-ated by entry to the east half of section eight (8), and the said townsite settlers of West Guthrie, never did have or could have any right to the tract of land in dispute in this cause.

The plaintiff further alleges that the said James M. Patterson and the said Ezra Maples never had any right, claim or interest
21 in or to the said southwest quarter of section eight (8), for the reason that they were never qualified to take lands or acquire any claim to lands in Oklahoma Territory, and that they, long prior to the said consum-ation of the litigation before the Land Department and the Secretary of the Interior defaulted in and abandoned their claim to said land, and the said plaintiff Henry H. Bockfinger is the only homestead claimant who pursued all of his remedy through the Land Department and before the Secretary of the Interior to said land, and that the plaintiff is the only person who ever acquired a vested right and interest, which the plaintiff alleges he did acquire, in and to the said southwest quarter of section eight (8), township sixteen (16) north of range two (2) west, and that he is now the equitable owner of said tract of land.

The plaintiff further alleges that on the — day of November, 1892, he made an application to make homestead entry of said lands at the United States land office at Guthrie, Oklahoma Territory, while the same was Government land of the United States, and he also applie l to make final entry thereof and to be allowed to make his final proof therefor and tendered to the United States land officers at Guthrie, Oklahoma Territory, and to the receiver thereof the sum of one and $\frac{25}{100}$ ($1.25) per acre for each acre of said southwest quarter of said section eight, and also tendered the sum of — dollars the commissions and fees for entering said land, all of which the said land officers and the said receiver of said land office refused to accept and refused to take from this plaintiff and refused to permit him to make his proof entry and payment for said tract of land.

That thereafter and on the — day of November, 1892, the

said defendants in this cause as townsite trustees for the townsite of West Guthrie entered the said tract of land at the land office at Guthrie, Oklahoma Territory, and procured final
22 receipt therefor and have since said time and prior to the filing of this complaint received a patent for said lands from the Government and now hold the title to said lands. That the said trustees hold the title to said lands as trustees for the use and benefit of this plaintiff, who is the equitable owner of said land, and is the only person who has a right thereto.

The plaintiff further alleges that he has demanded of the said trustees that they make him a deed for said tract of land, he at the time tendering to said trustees and offering to do equity in the premises as he now also tenders and offers to do, and that he offered said trustees and tendered to them the payment of the sum of two hundred ($200.00) dollars, the purchase price of said tract of land, and the sum of thirteen and $\frac{25}{100}$ dollars to pay all commissions and expenses for procuring the title to said tract of land, all of which the said trustees failed and refused to do.

Wherefore, the plaintiff prays that the said John Foster, W. S. Robterson and A. C. Schnell may be decreed to hold the title to the said southwest quarter of section eight (8) in township sixteen (16) north of range two (2) west, in trust as trustees for the use and benefit of this plaintiff, and that they may be adjudged and decreed by this court to hold the said land as such trustees and may be ordered and required and adjudged to transfer and convey said southwest quarter of section eight (8), township sixteen (16) north of range two (2) west, in Logan county, Oklahoma Territory to this plaintiff, and make him a good and sufficient deed therefor, and the plaintiff prays for all other just and proper relief in the premises.

(Signed) C. B. FREEMAN AND
BIERER & COTTERAL,
Attorneys for Plaintiff.

TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

Henry H. Bockfinger, of lawful age, being first duly sworn,
23 says: That he is the plaintiff in the above-entitled cause; that he knows the contents of the above and foregoing complaint and the allegations therein contained are true as he verily believes.

(Signed) HENRY H. BOCKFINGER.

Subscribed and sworn to before me this 25 day of February, 1893

[SEAL.] (Signed) FRANK L. DE LAY,
Notary Public.

Com. expires July 16, 1896.

24 EXHIBITS.

In the District Court of Logan County, Oklahoma Territory.

HENRY H. BOCKFINGER, Plaintiff,
vs.
JOHN FOSTER, W. S. ROBERTSON, and A. C. SCHNELL, Townsite Trustees of Townsite Board No. Six.

The within and following are Exhibits B, C, D, E, and F, attached to the plaintiff's complaint filed in the above-entitled court in the above-entitled cause, but which are presented separately from said complaint in order that said complaint may be more easily handled and made less cumbersome.

(Signed) C. B. FREEMAN AND
BIERER & COTTERAL,
Attorneys for Plaintiff.

25 EXHIBIT "B."

UNITED STATES LAND OFFICE, GUTHRIE, O. T.

TOWNSITE SETTLERS OF WEST GUTHRIE
vs.
MARK S. COHN, THOMAS J. TAYLOR, JOHN Eaton, Edmund Slater, George B. Martindale, M. W. Sawyer, James W. Feagins, James W. Patterson, Ezra Maples, H. H. Bockfinger, E. M. Baldwin, George C. Eldridge, Morrison Wilbur, and David K. Campbell. } W. ½ Sec. 8, 16 N., 2 W.

The A. T. & S. F. R. runs though section eight, township sixteen north, range two west, in a southeasterly direction and about forty rods east of the east line of the west half of said section. The depot, side tracks, etc. of said railway are located on the half-section line of said section, running east and west. The Cottonwood creek enters the west half of said section at the southeast corner, and passes partially through and around the same in a northwesterly direction, thence partially through the west half of the south half of the same, thence in a northeasterly direction through the north half of the southwest quarter of said section, making several bends and crossing said half-section line running north and south about twenty rods south of the center of said section and twenty rods west of said railroad, thence north parallel with said railway. The east half of section eight and the west half of section nine were settled upon by several thousand people for business and trade by three o'clock, p. m. April 22, 1889. At about 4 o'clock of said day from one hundred and fifty to two hundred people crossed said Cottonwood

creek at a point on the northeast forty of the southwest
26 quarter of said section, and staked off lots on a part of said forty north of said creek and also upon the northwest quarter of said section, also upon that part of the northeast quarter of said section which lies west of said creek. Such persons then, and for two or three days thereafter, believed that all west of creek was on the west half of said section. On the evening of April 22", 1889, said people held a mass meeting and organized a town to be known as West Guthrie, to be located on the west half of said section eight and elected town officers and took steps at a meeting held on the following evening to have said half section surveyed into lots, blocks, streets, and alleys. which survey of all that part of said half section north and west of said creek, to wit; the northwest quarter and a part of the northeast forty of the southwest quarter of said section, was completed during the early part of May of said year. Since such first meeting a city government and officers have been maintained, and valuable improvements made. The said settlements upon said northwest quarter was continuous, but to what extent is somewhat uncertain, until about the 7th day of May, from which time during said month and before the 24th day thereof the extent of such settlements and the making of improvements gradually increased. On the 15th day of June, 1889, there were from three to four hundred people settled upon northwest quarter, who were occupying each legal subdivision thereof for the purposes of business and trade, on which were improvements of the value of fifteen thousand ($15,000.00) dollars. Said northwest quarter has been occupied for business and trade ever since said date, and now has four hundred people thereon, with improvements of the value of $30,000.00. On the 19th day of June, 1889, said townsite settlers filed an application to enter the west half of said section as a townsite, on the 10th day of May, 1890, they filed an amended plat of said town. Some of the persons who went upon the northeast forty of the southwest quarter of said section remained on the lots staked by them. Other persons settled upon said forty-
27 acre tract and claimed lots, aggregating thirty or forty in number on June 15th, 1889. They, prior to that date, had planted garden, fenced lots, erected tents, a few small buildings, built foundations and began the erection of houses. On said date the military forces of the United States, at the instance of some one of the homestead claimants, but which one does not appear, were ejected from said tract of land and their improvements removed, for the reason given that the land had been taken as a homestead. Since said date and said removal, said tract has not been occupied by townsite claimants. The part of said southwest quarter, of said section south of said creek, to wit: the south half and the northwest quarter, has never been surveyed into lots, blocks, streets, and alleys.

At noon April 22, 1889, Mark S. Cohn was at Guthrie, Ok. and soon after that hour made homestead entry No. one for the northwest quarter of section eight. He has not established a residence upon said land, nor cultivated or improved the same.

On the trial of said cause he was called and defaulted.

On March 23rd, 1889, Thomas B. Needles was appointed United States marshal for Indian Territory, with headquarters at Muscogee. On the 16th day of April, 1889, said Needles appointed Thomas J. Taylor a deputy, and ordered him to report at Guthrie, I. T. for duty. That on the 21st day of April, 1889, said Taylor arrived at said Guthrie pursuant to said orders and entered upon the discharge of his duties; that he did not enter upon the land herein claimed by him before noon, Apr. 22nd, 1889, that at 12.15 p. m. Apr. 22, 1889, he settled upon the northwest quarter of said section eight, as his homestead and immediately began improving the same; that before the 7th day of May, 1889, he had said tract of land surveyed, enclosed with a wire fence, broke out forty-five acres of ground, and made improvement to erect a dwelling-house; that he has continuously resided upon and improved said tract to the present
28 date—his improvements are of the value of fifteen hundred dollars—that he is a native-born citizen of the United States, the head of a family, over the age of twenty-one years, and has never had the benefit of the homestead laws, and on the 25th day of April, 1889, he made an application to enter said tract as a homestead, which was rejected for conflict with the prior homestead entry of Mark S. Cohn; thereon the 31st day of May, 1889, he filed an affidavit of contest against Mark S. Cohn, involving said entry and tract of land in which he alleged, "that said Mark S. Cohn did not file an application and make homestead entry of said lands until after this contestant had settled upon and made *bona fide* improvements" on the same as his homestead, afternoon, Apr. 22nd, 1889; that said Mark S. Cohn entered upon said land after Mar. 23rd, 1889, and "before noon Apr. 22nd, 1889, in violation of the President's proclamation," the above findings of facts as to Taylor are based upon an agreement made of record between him and townsite claimants.

Edmond Slater settled upon the northwest quarter of said section the 22nd day of Apr., 1889, and has since that time resided and made improvements thereon as a townsite settler and town-lot claimer and has made no settlement thereon as a homestead claimant. On the 9th day of *Jan.*, 1889, he filed a contest affidavit against Mark S. Cohn involving said homestead entry and said tract of land, alleging "that contestants, to wit, George E. Marlindale, M. M. Sawyer, Thomas Taylor, and John Eaton have no legal claim or right to secure title of said land; that said Mark S. Cohn made an illegal entry thereon and is not entitled to secure title to the same by reason of violating the law and the President's proclamation in entering the Territory, and that this contestant is the first and only legal and *bona fide* settler thereon." He made no application to enter said tract as a homestead, and filed no contest or application for a hearing, except as above set forth.

George E. Marlindale May 24th, 1889, filed an affidavit of contest against said Mark S. Cohn, involving said entry, alleging
29 in substance, that said Cohn entered upon and occupied the said tract of land prior to April 22nd, 1889.

On June 5th, 1889, John Eaton made an application to enter said

quarter section as a homestead, which was rejected, for conflict with prior homestead entry No. one by Mark S. Cohn. No appeal was taken from said rejection.

May 25th, 1889, M. M. Sawyer filed an affidavit of contest against said Mark S. Cohn, involving said land and homestead entry, alleging, "that said Cohn entered upon and occupied said tract prior to twelve o'clock, noon, Apr. 22nd, 1889, and that this affiant is the only legal occupant of said land; and that "he made his entry and occupancy — afternoon, April 22nd, 1889 and prior to the entry and occupancy of any other person after said date and time." He made no application to enter said tract as a homestead. The evidence does not show that he had made settlement or established a residence upon the land.

He testified that he made settlement May 22nd, 1889, and established a residence May 26th, 1890, but no facts appear in the record from which such conclusion can be drawn.

That on the 21st day of Jan., 1889, James W. Feagins was in the employ of the Atchison, Topeka and Sante Fe Railroad Company as a section foreman, and as such stationed at Guthrie station Oklahoma, and continued in such company's employ until July, 1890, that on the 22nd day of April, 1889, at 12 o'clock and thirty-five minutes p. m. standard time, he went upon the southwest quarter of said section and made settlement thereon and has since then resided with his family and was the first settler thereon; that he has fenced said tract and built a residence thereon; that he is over twenty-one years of age, and head of a family, and a native-born citizen of the United States; that on the 23rd day of April, 1889, he made homestead entry No. 17, of said tract for the purpose of actual settlement and cultivation for his own exclusive benefit, and before said entry he never had the benefit of the homestead laws; the above findings of facts as to Feagins is based upon an agreement made of record as to the facts, made by him and the said townsite settlers.

On the 18th day of May, 1889, James W. Patterson filed an affidavit of contest against said Feagins. He filed a dismissal of said contest September 24th, 1890.

Ezra Maples is a native-born citizen of the United States, over 21 years of age, a married man, head of a family, and has never taken a homestead. At noon, standard time, at 11.31 a. m. mean time April 22nd, 1889, he left the western line of Oklahoma and entered the Territory for the purpose of taking a homestead. At about 6 o'clock p. m. of said day he went upon the southwest quarter of said section eight and claimed the same as his homestead. He dismounted and partially made a corrall for his horse; he slept on another tract of land that night. On the 23rd of April he erected a tent on said land, finished his corrall, and has resided on said land from that time until now. He has dug a well, constructed a frame house 12 x 16 feet in size, and some out-buildings. He fenced one hundred and twenty acres of said land and has fifteen or twenty acres under cultivation, all south of the Cottonwood creek. On the 18th day of May, 1889, he filed an affidavit of contest against said

entry, alleging in substance that said Feagins entered upon and occupied said tract of land prior to noon, on Apr. 22nd, 1889, and that he (contestant) made settlement thereon — afternoon on said day, and has improved the same. On the 11th day of May, 1889, he made an application to enter said tract as a homestead, which was rejected for "conflict" with the prior homestead entry of James W. Feagins. No appeal was taken from said rejection.

On the 24th day of May, 1889, Henry H. Bockfinger filed an affi-
davit of contest against said tract and said entry involving
31 said southwest quarter alleging in substance that said Feagins entered upon and occupied said tract prior to noon on April 22nd, 1889; that on the 20th day of April, 1890, he settled upon said tract and has since resided thereon, and made the following improvements:

A dwelling-house 14 x 18 feet in size, two acres broken and planted in crop, and some fencing. He has expended on improvements about two hundred and fifty dollars.

On July 22nd, 1889, Ed M. Baldwin filed an affidavit of contest and against said Feagins. On the trial of this cause said Baldwin was called and defaulted.

On July 22," 1889, T. M. Baldwin filed an affidavit of contest against said Feagins. On the trial of this cause he was called and defaulted.

On July 24th, 1889, George C. Eldridge filed an affidavit of contest against said Feagins. On the trial of said cause he was called and defaulted.

On July 23rd, 1889, Morrison C. Wilbur filed an affidavit of contest against said Feagins. On the trial of this cause he was called and defaulted.

On the 28th day of July, 1889, David K. Campbell made an application to enter said tract as a homestead, which was rejected, for conflict with said prior homestead entry, and thirty days allowed for appeal. No appeal was taken from said rejection. The homestead entry on the northwest quarter of the section in question was made before any claim thereto had been initiated by any other homestead or townsite claimant. That entryman violated the act of Congress of Mar. 2nd, 1889, and the proclamation of the President issued in pursuance thereof. He had also abandoned the tract. This controversy then rests priorly between townsite settlers, homestead settlers, and contestants over land which had previously been segregated from entry or settlement. The rights of the homestead
and townsite settlers which are equities, only date alike from
32 the first initial acts by them done in good faith. Mr. Taylor was the first settler and made valuable improvements, but he also violated said act of Congress and proclamation, and was not qualified to make bonified settlement. Mr. Sawyer and Slayer claimed settlement and residence but they failed to prove either. This disposes of the homestead settlers. The remaining homestead claimants are contestants under the second section of the act of Congress of May 14th, 1890.

They claimed no equities in the land. Their rights, if they have

any, are based upon a naked reward to be given by the Government for the discovery and cancellation of an illegal entry.

That reward consists in preference right of entry of the tract for homestead purposes for the period of thirty days. The question here is have they acquired such right to the land as to defeat the settlement and claims of the townsite settlers? These contest affidavits were filed May 24th, 25th, 31st, June 5th, 1889, and Jan. 9th, 1890, respectively. As against the entrymen they are only contestants. As against the townsite settlers these homestead claimants, asserted their rights as such to prevent the land being taken for business and trade. Their good faith as such claimants is in issue. The evidence clearly shows that on said dates said tract was occupied for the purposes of business and trade by several hundred people, who had laid out a town by surveying said tract into lots, blocks, streets and alleys; had made valuable improvements and were maintaining officers and a municipal government. In their several contests affidavits these contestants swear that they were at that time well acquainted with this tract of land therefore they know of such settlement, occupancy and improvements. It is not probable that they really want said tract of land for a farm. It cannot be they are *bona fide* homestead claimants. Making their claims at such times and under such circumstances clearly indicate that they are speculators. Said tract having been occupied for the purpose of
33 business and trade, then, and being so occupied now, it should not be held subject to homestead entry.

James W. Feagins was the first person to make settlement upon the southwest quarter of said section, and, if he is a qualified entryman, his entry should be protected as against all subsequent homestead or townsite settlements. The evidence shows that he was in the Territory between the date of the passage of the act of Congress M'ch 2nd, 1889, and noon Apr. 22, 1889, and that six minutes after noon on said day, meridian time, he entered upon and occupied said tract as a homestead.

Said act of Congress was passed to give every man equal chance with every other man to get a home in Oklahoma, and to prevent any one from taking advantage. Its provisions apply as well to those who are in the Territory legally or otherwise, as to those who were held on the border until that hour.

Mr. Feagins was not only in the Territory but took advantage of being in and settled upon this land at a time when other people were prohibited by the law from so doing, and was thereby disqualified from making settlement or entry of lands in Oklahoma.

The evidence shows that about four o'clock p. m. Apr. 22nd, 1889, 150 to 200 townsite settlers crossed the Cottonwood and began making settlement upon the northeast forty acres of said southwest quarter, and upon the northwest quarter of said section; that some of them staked lots on said forty acres and made settlements thereon; that on the 5th day of June, 1891, there were from thirty to forty townsite settlers on that tract, who laid off lots, blocks, streets and alleys, fenced lots, planted gardens, began foundations, the erection of houses, and a few small houses had been completed.

On said date they were compelled by the Army of the United States, at the instance of the homestead claimants, to abandon such settlements and improvements. Such settlements were begun before the settlement of any homestead claimant except said Feagin.

34 A sufficient number occupied the same for the purpose of business and trade to segregate it from homestead entry. The question asked, was the surrender of their possession under such circumstances an abandonment of their claims? We think this question must be answered in the negative. At that time the people of Oklahoma were practically without government, law or courts.

Peace and quiet were maintained by the military forces; the command of the officers had to be obeyed. Resistance was not only dangerous but useless. The officer in this instance undoubtedly acted under the belief that those people were trespassing upon the homestead of Mr. Feagin. Technically that was true. But as to all other homestead claimants and townsite settlers they acquired equities by such settlements, which the Government will protect; in justice and equity, that which they lost by superior force should be restored to them.

Remaining portions of said southwest quarter have never been surveyed into lots, blocks, streets or alleys, and have never been settled upon and occupied for the purpose of business and trade. The rights of several homestead claimants attached before an application was made to enter the same as part of West Guthrie and are superior to the claim made to the same for the purposes of business and trade.

We, therefore, recommend that homestead entry No. 1 of Mark S. Cohn and homestead entry No. 17 of James W. Feagins be held for cancellation; that on proper application therefor the occupants of the northwest quarter and the northeast quarter of the southwest quarter, tp. 16 north, range 2 west be allowed to make entry of the same under the provisions of the act of May 14, 1890, and that a hearing be ordered to determine the rights of the several homestead claimants to the residue of the said southwest quarter.

(Signed) JOHN I. DILLE, *Register*.
(Signed) C. M. BARNES, *Receiver*.

35 EXHIBIT "C."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August* 4, 1891.

TOWNSITE SETTLERS OF WEST GUTHRIE
vs.
MARK S. COHN, THOMAS J. TAYLOR, JOHN Eaton, Edmund Slater, George B. Martindale, M. W. Sawyer, James W. Feagins, James W. Patterson, Ezra Maples, H. H. Bockfinger, E. M. Baldwin, George C. Eldridge, Morrison Wilbur, and David K. Campbell. } W. ½ Sec. 8, 16 N., 2 W.

Register and receiver, Guthrie, Oklahoma.

GENTLEMEN: With your letter of January 12, 1891, was transmitted the papers in the above-entitled case. It appears on examination in this office that the qualification of one of the defendants, M. S. Cohn, as a homesteader had not been inquired into at the hearing had before you, the case was by letter "G" of May 5, 1891, remanded to you for a supplemental hearing as to that feature.

I now have the entire record of the case before me as transmitted with your letter of July 21, 1891. At this supplemental hearing were made three motions to dismiss, two by Cohn and one by Bockfinger. Cohn's first motion is based upon the allegation that the affidavit asking for the order of notice by publication does not set out the steps taken to secure personal service. Inasmuch as said affidavit alleges the non-residence of Cohn, this ground is untenable and the motion is dismissed.

The second motion is to the effect that he is not identified as being the M. S. Cohn who made homestead entry No. 1. The clerk of the land office, however, testifies that he knows Cohn, the defendant in this case, that he saw him at Oklahoma Territory on April 21, 1889 and on Apr. 22, when he was the first man to enter the U. S. land office after the same was opened for business. The homestead entryman is the defendant in this case, and he is as described in the published notice. It is he that was served by such motions and affected by this decision; so far as this homestead entryman Cohn is concerned the notice is complete. If the party making the motion is *another* man, he has no interest in this proceeding. I have therefore to dismiss said motion.

Bockfinger's motion is also based upon want of service, but in view of the fact that this last hearing is simply supplemental to that heretofore had, and Bockfinger's rights were in no way involved, his application for contest being for a different tract of land,
36 his motion is dismissed and the case passed upon on its merits.

The historical features of the opening of Oklahoma Territory, the

mad rush from all points to desirable locations, and more especially to desirable sites for towns and cities, the struggles of the various factions for supremacy in the municipal governments, and the contests bitterly fought between agricultural claimants and townsite settlers have been fully set out in former decisions of this office and of the department, notably in the Guthrie cases, and need no recapitulation here. The story of West Guthrie is no exception to the rule. The same rush for locations, the same struggle for supremacy in office, and the same quarrels as to priority of rights took place here.

The location of the land involved in this contest is directly west of and adjoins that covered by Guthrie proper. The E. ½ of sec. 8, and the west ½ *half* of sec. 9, were settled upon by several thousand people for business and trade within a few hours after the hour for the opening of said territory. At about 4 o'clock on April 22, 1889, between 100 and 200 people crossed Cottonwood creek, then supposed to be the boundary between E. ½ and W. ½ of said sec. 8, but which really ran through the N. W. ¼ of the N. E. ¼ of sec. 8, about 20 rods east of the dividing line, and staked off lots, some on that portion of the N. W. ¼ of the N. E. ¼ west of the creek, and some on the west ½ of sec. 8. These parties at that time, and for some days thereafter, believed that all west of the creek settled upon by them was the W. ½ of sec. 8. On the evening of April 22, 1889, a mass meeting was held and took the preliminary steps to organize the town of West Guthrie. A series of meetings were held in quick succession, at which officers were elected, arrangements made for the survey of the land into lots and blocks. This survey was completed in the early part of May. Since the meeting a city government has been maintained and public improvements made. The townsite settlement on the N. W. ¼ of sec. 8, has been continuous since the first rush until the day of hearing, at which time 400 people resided and did business thereon, with improvements to the value of $30,000.00. This settlement and improvement of the S. W. ¼ of sec. 8, was more meagre, and appear- to have been confined to the N. E. ¼ of the S. W. ¼ and more particularly to the neck of land formed on the north side thereof by a crook in the creek; some of the townsite settlers remained, and on June 15, 1889, numbered about 30 or 40, having houses, gardens, etc. On that date the military forces of the U. S. ejected these settlers in the interest of some of the homestead claimants, and removed their improvements.

Of the various claimants of these several tracts, the following appears of record, to wit:

On June 12 1889, an application was filed by James Dooley for the W. ½ of sec. 8, 16 N., 2 W., as a townsite for the use and benefit of the inhabitants of said town.

Shortly after noon of April 22, 1889, Mark S. Cohn made *homestead No. 1* for the N. W. ¼ of said section 8.

As contestant against said entry there appears Thomas J. Taylor, who on April 25, 1889, applied to enter this tract as a homestead, alleging his settlement thereon April 22, his improvement of the land, etc. Said application was rejected for conflict with Cohn's entry then of record. On May 31, 1889, he filed affidavit of contest

against Cohn, alleging that the latter did not make the entry until after applicant's settlement, and that Cohn *had entered the*
37 *land before noon of April 22, 1889*, in violation of the President's order.

Edward Slater, who also settled upon the land April 22, 1889, and filed affidavit of contest against Cohn's entry January 10, 1890, attacking Cohn's qualifications as well as those of a number of other contestants against the said entry, namely, George B. Martindale, M. W. Sawyer, Thomas Taylor and John Eaton.

George B. Martindale also filed on May 24, 1889, an affidavit of contest against Cohn's entry, alleging settlement similar to those contained in Taylor's affidavits.

John Eaton, who on June 15, 1889, filed application to enter said quarter section as a homestead; this application to enter was rejected by you on account of the pendency of Cohn's entry and no appeal was taken from such rejection.

And M. W. Sawyer, who on May 25, 1889, filed affidavit of contest against Cohn's entry, alleging priority of settlement and the disqualification of Cohn.

On April 23, 1889, James W. Feagins made homestead entry No. 17 for the S. W. ¼ of sec. 8, 16 N. 2 W.

On May 8, 1889, James W. Patterson filed affidavit of contest against said entry, but dismissed the same on September 24, 1889.

Ezra Maples filed contest against Feagins' entry on May 3, 1889, alleging Feagins' disqualifications by reason of his being within the Territory prior to the fixed day, and in violation of the President's proclamation.

On May 16, 1889, he made application to enter said tract as a homestead, which application was rejected on account of Feagins' entry, and no appeal was taken from said rejection.

On May 24, 1889, Henry H. Beckfinger filed affidavit of contest against Feagins' entry, alleging the disqualification of the latter on the same ground as set out in Maples' contest affidavit, as well as his own settlement and improvement of the land.

E. M. Baldwin filed affidavit of contest July 22, 1889, against Feagins' entry, on the same ground. You report his default at the hearing.

On July 24, 1889, F. M. Baldwin filed affidavit of contest against Feagins' entry on the same ground. He too defaulted at the trial.

So, too, did Morrison C. Wilbur, who filed contest against Feagins' entry on July 23, 1889.

On July 28, 1889, David K. Campbell made homestead application for the S. W. ¼ which was rejected on account of Feagins' entry and 30 days allowed for appeal. After due notice no appeal was taken.

We have then the following classes of persons to deal with:
38 1st. The townsite settlers as a body under the townsite application through their legally selected representative.

2d. The homestead entrymen, whose entries are of record, to wit, Cohn and Feagin.

3d. The applicants to contest Cohn's homestead entry, and who are

still asserting their rights, to wit, Thomas J. Taylor, Edward Slater, Geo. B. Martindale, and M. W. Sawyer, and those contesting Feagins' entry, Ezra Maples and H. H. Bockfinger.

4th. The applicants to make entry and to contest all existing entries, but who by reason of failure to appeal from the rejection of the applications to enter, or to their failure to appeal after due notice, are held to be in default, to wit, John Eaton, J. M. Patterson, E. M. Baldwin, F. M. Baldwin, S. C. Eldridge, and D. K. Campbell.

This latter class having all been cited to appear in accordance with the requirements of the rules of practice must be held to have had their day in court, and may now be treated as being out of the case, and will receive no further consideration.

The townsite application was transmitted to this office under general instructions to that effect. By letter "G" of October 23, 1889, a hearing was ordered in the premises, referring to the letter of August 8, 1889, for the subject-matter to which said hearing should relate, and which are set forth in the letter as follows:

"I therefore hereby direct that you order a hearing pursuant to the rules of practice to determine whether or not there is more than one town on the two sections of land covered by the above-mentioned application, *when said land was first actually selected and occupied as a townsite or townsites as the case may be, and the number of inhabitants, character and location of all municipal improvements thereon both at the dates of filing said applications and the date of hearing. Also to determine whether* the applicants established settlements on the lands they sought *to enter and if so the date thereof*."

To these subjects was added a further theme of inquiry in said letter of October 26, 1889, in this language: "The object *of this hearing is certainly to determine the right of the townsite claimants, and I hereby direct that the only question you should inquire into in addition to those mentioned in my former letter is the qualifications of the homesteaders as such at the date of making their entries.*"

These instructions are so concise and specific as to leave no doubt as to the scope of my present inquiry. To attain the most definite results I propose to now inquire as to the status of each of the parties above mentioned at the date of the hearing, with the exception of those who made default.

When the case was first set for trial all had been duly summoned with the exception of Cohn, and for the purpose of securing proper service upon him a continuance was had at the instance of the townsite representatives and he was duly served by publication. At the hearing he made default, and the same proceeded. But upon examination of the record by this office it was found that although the entryman of record, with vested right, no attempt was
39 made to impeach his *qualifications* as a homesteader notwithstanding the direct instructions of that part above set out, but on the contrary it was attempted to show an *abandonment by him* and non-cultivation of the tract as a basis for setting aside the entry, and it was held by this office that in view of the restricted scope of the inquiry as set out by the foregoing instructions, such testi-

mony could not be entertained, and that while there was little or no room for doubt that Cohn was disqualified by reason of having entered the Territory in violation of the President's proclamation the same must be established in a proper and judicial manner before official cognizance thereof could be taken by this office. With this in view the case was remanded and a further hearing ordered as to this particular feature of the case. In all other respects the relative situation of the parties is the same as when the case was first sent up.

Cohn, first on the field, and first at the land office, is now shown to be disqualified. He was in the Territory and on the land prior to the hour fixed by the President and his homestead entry is therefore clearly illegal and must be held for cancellation.

Thomas J. Taylor settled on the tract under the homestead law shortly after noon on July 22, 1889, but as appears from the agreed statement of facts filed with the record he entered the Territory before 12 o'clock noon of April 22, 1889, and although he was there by authority in his capacity as U. S. deputy marshal, his settlement on the land at the earliest possible moment places him fairly and squarely within the purview of the decision of the Hon. Secretary of the Interior in the Kingfisher case, wherein it was held. "The evident purpose of the law was to prohibit one or another entering the Territory before the proclaimed hour *with a view and purpose of settlement of any part thereof*. No one could be there legally with such purposes in whole or in part whether there before the time by some permit or without it, the one who then entertained the intention of making a settlement and to use the advantage which his presence gave to the exclusion of others was violating the spirit of the law, and it destroyed his claim when attempted. If he had declared it he should have been expelled; if he exhibited such preconceived purpose by his subsequent acts he not only could not lawfully claim any particular tract, but forfeited all right to future acquisition. Any special license to be present must have been for another and entirely different purpose. No license could be granted against the statute, and no one could successfully pervert his license or special employment to defeat the equal and just operation of the statute upon all alike. The permit was exhausted in protecting its possessor. It could not be used as a weapon against others. The moment the possessor of such special privilege formed the purpose to take advantage of his position for the selection and seizure of a tract of land his license was valueless, and he became a trespasser from that moment. To hold that a few with permits, or apparently engaged within the limits of these lands, any more than others without license, could pick out their claims in advance of the hour of opening, and pounce upon them at the very moment the signal was given to the others to start on their long race, would be to support pretension and favoritism and punish honorable obedience to authority. It is neither the law or the equity of the case, and will not be allowed. He who being within these lands by special authority as deputy marshal, train-hand, wagonmaster, or other, had the purpose to jump upon the particular tract, and who gave the evi-

dence of his prior intent by his conduct immediately thereafter, violated the statute. Such persons had entered upon and occupied this Territory for the purpose of settlement before the hour arrived in the proclamation, whatever license they may hold, or self-indulgent and self-deceiving pretext they may now present. They were not licensed or employed thus to defeat the law and injure their neighbors.

"Both classes were prohibited from acquiring rights to those lands. Those who were in the Territory at and before the hour designated in the proclamation without pretense of special license, and those who were there by special authority or for the special purpose, and attempting to pervert their presence to secure claims before others held on the border, could arrive, even from the most distant parts thereof.

"On the other hand, I do not think that it was the intention of Congress that a man who happened to be legally in the Territory but did not use his position to his own advantage, or to the disadvantage of his fellow-citizens should be forever prohibited from acquiring any rights in the Territory. Each case must be determined upon its own merits, but it may be said generally, that the presence in the Territory before the opening under the proclamation and the actual settlement, and entry at the land office must be so wisely and obviously separate in every detail and circumstance as to render it impossible to reasonably conclude that the one was the result of the other, or in any way dependent upon it." (See Kingfisher *v.* Wood *et al.*, 11 L. D. 330.)

It is clear that whether or not he formed such a purpose when he accepted the appointment he availed himself of the facility thereby offered, and at once settled upon a valuable tract of land as soon as he could consistently with his construction of the law, but in view of the aforesaid decision he must be held not to have been qualified to make a valid settlement under the homestead law applicable to Oklahoma at the date of such attempted settlement.

Edmund Slater, although he made no application to make entry at any time prior to hearing settled on the land April 22, 1889, and filed affidavit of contest against Cohn and others on January 19, 1890. His residence and improvements as a *town-lot* claimant preclude any interest, on his part, against the town, whereas his contest against Cohn is involved in the general contest, and as a whole against that of the defendant.

George Martindale made no application to enter and alleges no settlement, but on May 24th filed an affidavit of contest long subsequent to the time when the townsite settlement was made, and the consequent reservation of said land became effective, if the homestead entry of Cohn should be cancelled.

M. W. Sawyer, is similarly situated. He made no application to enter, and the testimony fails to show that he established a residence on the land. His application to contest is dated May 25, 1889.

James W. Feagins went on the land at 35 minutes after 12 o'clock on April 22, 1889, and on April 23, 1889, made homestead entry No. 17 for the S. W. ¼ of sec. 8. As appears from the agreed statement

of facts signed in his behalf, he was an employee of the railroad company, which had a depot on or near the land, and in his capacity as such employee was within the Territory at the opening thereof and used his position to secure advantage over the army of homesteaders who waited on the border for the starting signal. He comes fully within the views expressed in the case of Taylor, *supra*, and his homestead entry must be held for cancellation.

Ezra Maples started fairly from the boundary and reached
41 the tract in dispute at about 6 o'clock of April 22, and claimed the same as a homestead. He made a temporary corral for his horse, and on the day following erected his tent and resided continuously on the land to the date of hearing, when he had a house, outbuildings and well, fences aroun/ 120 acres. On May 8, 1889, he filed a contest against Feagins' entry, alleging the latter's disqualification by reason of his violation of the President's proclamation. On May 1, 1889, he filed application to make homestead entry, which was rejected and no appeal taken although he appealed from your decision in the case as a whole. His right as a settler will be discussed in connection with those of the town later on.

On May 24, 1889, H. H. Bockfinger filed a contest against the entry of Feagins, alleging his own settlement and improvements on the land and disqualification of Feagins. This contestant's rights cannot be determined in this proceeding, but depend on the final adjudication of the townsite and Maples' claim.

The town, as above stated, was organized on April 22, in the afternoon, and at once settled upon the W. ½ of sec. 8, together with such portions of the N. E. ¼ of sec. 8 as lay west of the Cottonwood creek. They made their settlement on the N. W. ¼ and on the N. E. ¼ of the S. W. ¼. It cannot affect the rights of the settlers on the N. E. ¼ of the S. W. ¼ or those of the town as a whole, that those settlers in obedience to military authority removed from the 40-acre tract. Residence would have been useless, and their proper and only course was to acquiesce in the removal until the matter could be fully determined. They in no way surrendered any right, nor is the town deprived, by such removal, of any portion of the land, it was legally entitled to claim. It was then the intention to take the W. ½ of sec. 8, as a townsite, that purpose has never been changed. The survey was commenced, streets, alleys, lots and blocks laid out, and in due course an application for such land for townsite purposes was filed in your office. The original Oklahoma act provided for the townsite entries not to exceed 320 acres, but no provision was made as to the proper method of making such entries. The act of May 14, 1890, relieved this question, and ratified the applications then pending. Although the town did not at date of such application cover or occupy each legal subdivision, the occupation of any portion of the land selected and settled upon by 100 or more inhabitants warranted the selection of 320 acres, and the consequent withdrawal of the entire tract. You seem to have been guided by a contrary view, and awarded to the town the N. W. ¼ and the N. E. ¼ of the S. W. ¼ sec. 8, as being the tracts actually settled for town purposes. In this you erred. Up to and prior to

the act of May 14, 1890, the settlement by one hundred persons on any portion of this land was sufficient to warrant the townsite application for the entire W. ½ of said section. See my decision in the Guthrie case January 13, 1891, page 40 *et seq.*, affirmed by the Hon. Secretary of the Interior June 22, 1891, copy of which was transmitted to you by letter "G" July 24, 1891.

If, however, on May 14, 1890, the date of the passage of the act above referred to, the town did not occupy each legal subdivision of the land claimed by it, and a qualified homesteader made a valid settlement on such unoccupied subdivision prior to such occupation of the town, such a settler should be allowed to make an entry thereof. This, however, can only be determined when the
42 town offers to make proof and payment, when such a settler may be heard and allowed to show his right in the premises. This would appear to be the position of Maples, or, in the event of his demise, of Bockfinger.

In conclusion then, I, affirm your decision as to the homestead entries of Cohn and Feagins, which, if this decision becomes final, will be cancelled for illegality, and modify your decision as to the three 40's in the S. W. ¼ of sec. 8, and award the entire W. ½ of sec. 8 to the town, subject to this condition, namely: that, if, when proof is offered, it shall appear that each legal subdivision thereof had been occupied for municipal purposes prior to or on May 14, 1890, or subsequent thereto and prior to the initiation of a valid homestead claim to any portion thereof, such entry shall be allowed. But if it appears that one or more legal subdivisions thereof shall not have been so occupied at the time named, such subdivision shall be excluded from said entry, and a hearing will be had to determine under the law and rules of practice who is the party rightfully entitled to make entry of the same.

So advise the parties in interest, allowing ten days.

(Signed) THOS. H. CARTER.
Commissioner.

(Endorsed on back:) Dec. Carter, Com. Gen. Land Office.

43 EX. "D."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December* 16th, 1891.

TOWNSITE SETTLERS OF WEST GUTHRIE, OKLAHOMA TERRITORY,
vs.
MARK S. COHN ET AL.

The Commissioner of the General Land Office.

SIR: I have considered the various appeals taken from your decision of August 4, 1891, in the case of West Guthrie Townsite *vs.* Mark S. Cohn *et al.*, involving title to the W. ½ of sec. 8, 16 N. 2 W. Guthrie, Oklahoma Territory, holding the homestead entries of Mark S. Cohn, for the N. W. ¼ of sec. 8, 16 N. 2 W. and of James W.

Feagins for the S. W. ¼ of said section, for cancellation, and awarding the entire W. ½ of said section to the townsite, "subject to this condition, namely: that, if, when proof is offered, it shall appear that each legal subdivision thereof had been occupied for municipal purposes prior to or on May 14, 1890, or subsequent thereto, and prior to the initiation of a valid homestead claim to any portion thereof, such entry shall be allowed, but, if it appears that one or more legal subdivisions thereof shall not have been so occupied at the time named, such subdivisions shall be excluded from such entry and a hearing will be had * * * to determine who is the party rightfully entitled to make entry of the same."

The voluminous record in this case has been examined, and it is found that your decision appealed from contains a succinct statement of the facts in the case. Your judgment holding the entries of Cohn and Feagins for cancellation is affirmed, and your action in dismissing the case as to John Eaton, J. M. Patterson, E. M. Baldwin, G. C. Eldridge, Morrison C. Wilbur, F. M. Baldwin, and
44 D. K. Campbell is also affirmed. But I cannot affirm that part of your decision holding that townsite entries cannot be made under the Oklahoma townsite act of May 14, 1890, (26 Stat. 109) for legal subdivisions not actually occupied for municipal purposes by the townsite at the date of the passage of the act above cited. Under said act 100 people or more may select 320 acres of land in Oklahoma Territory for a townsite, although they may not at the date of the selection or of the townsite act use such smallest subdivisions thereof for municipal purposes. (Townsite of Norman *vs* Robert Q. Blakeney, 13 L. D. 399; Wm. H. Walker *vs.* Townsite of Lexington, 13 L. D., 404.)

The settlers of the townsite of West Guthrie selected the W. ½ of sec. 8, 16 N., 2 W. as the site of a town at about 4 o'clock p. m. April 22, 1889. Town meetings were held that day and the next, and organization affected, taxes collected from those who had on the first day located and claimed lots, officers were selected to preside over and control the affairs of the town, and organization for municipal purposes has been kept up continuously since that date. There were at least 100 people who selected this tract for town purposes on April 22, 1889, before any agricultural claimants made any settlement or claim on either of said tracts, except Cohn, Feagins and Taylor, who were not eligible to make settlement at that time because of their presence in the Territory prior to 12 o'clock, noon, on the day said country was declared to be open for settlement, which gave them an undue advantage over others. After the settlers of West Guthrie had made their selection of the W. ½ of said section for townsite purposes and taken possession thereof on April 22, at about 4 o'clock p. m., the time had passed when any one could initiate a homestead claim for any part thereof, and the fact that a portion of the tract embracing about 120 acres has not yet been settled upon as a place of residence will not pre-
45 vent said portion from being included in the townsite entry.

Towns are not built in a day, and from the very nature of things they should not be required to improve each of the smallest

legal subdivisions in their selection before making entry, any more than a homestead claimant should be required to improve each 40 acres making up his homestead before making final entry. The reasoning used in the two cases above cited applies with equal force to the case at bar. You will allow the town settlers of West Guthrie to enter the W. ½ of sec. 8, 16 N., 2 W., as a townsite, under the act of May 14, 1890. Your decision is accordingly modified, and the papers in the case are herewith returned.

Very respectfully,

(Signed.) JOHN W. NOBLE, *Secretary.*
G. C.

46 EXHIBIT "E."

706–1892.
3691–1892.
15–765.

W. C. F.

OCTOBER 3, 1892.

TOWNSITE OF WEST GUTHRIE
vs.
MARK S. COHN ET AL. } On Review.

The Commissioner of the General Land Office.

SIR: The attorneys of Henry H. Bockfinger have filed a motion for review of departmental decision of December 16, 1891, in the case of Townsite of West Guthrie *v.* Mark S. Cohn *et al.* (13 L. D. 690) involving the W. ½ of section 8 T. 16. N. R. 2 W. Guthrie Oklahoma la'd district.

The claim of the townsite covers the whole west ½ of said section 8. There were various adverse claims to the respective tracts in this half section by way of entries, applications to enter and applications to contest entries, of which many were disposed of by default at the hearing had before the local officers, others by failure to appeal from the adverse decision of the local officers, and others by failure to appeal from the decision of your office adverse to them, while all claims save that of the townsite settlers were decided against in the decision of this department in which all have acquiesced except Bockfinger, who presents the motion now under consideration. One of the claims adverse to the townsite claimants was that of James W. Feagins under his homestead entry made April 23, 1889, for the S. W. ¼ section 8 T. 16 N. R. 2 W. Of the various affidavits of contest filed against said entry all were disposed by the decision of the local officers except those of two parties, whose ap-

47 peals were allowed and considered by your office, and hence these two are the only ones necessary to mention at this time.

One Ezra Maples filed his affidavit of contest against said entry on May 8, 1889, alleging Feagins' disqualifications as an entryman because of his being within the Territory prior to the day it was opened to settlement. On May 24, 1889, Bockfinger presented his affidavit of contest against Feagins' entry upon precisely the

same grounds as had been set forth in Maples' affidavit. While both these affidavits were received by the local officers and marked filed, no notice was ever issued under either of them, and no steps taken to bring about a hearing thereunder. Of course nothing could be done with Bockfinger's until the prior one had been disposed of.

On June 18, 1889, an application to make townsite entry for the W. ½ of said section was filed in the local office, which was transmitted to your office. With the facts as to the various claims to this land before you, you ordered a hearing to determine when the land was first actually selected and occupied as a townsite or townsites, the number of inhabitants, the character, value and location of all municipal improvements thereon, and as to the settlement and dates thereof by the homestead claimants. To these points was afterwards added one as to the qualifications of the homestead claimants. This hearing was first fixed for December 3, 1889, but was continued at various times and for various reasons until March 28, 1890, when the case was called for trial. Up to this time Bockfinger had asserted no claim to the land as a settler, but in his testimony given on June 3, 1890, he states that he settled on said S. W. ¼ about April 20, 1890, and had thereon a house and other improvements of the value of $250.00.

As a result of the hearing the local officers decided in favor of the townsite claimants as to the N. W. ¼ and the N. E. ¼ of the S. W. ¼ of said section 8, and that a hearing should be had to determine the rights of the several homestead claimants as to the N. W. ¼ of the S. W. ¼ and the S. ½ of the S. W. ¼. Upon ap-
48 peal by the various parties, your office awarded the entire W. ½ of said section to the townsite claimants, "subject to this condition, namely, that, if when proof is offered, it shall appear that each legal subdivision thereof had been occupied for municipal purposes prior to, or on May 14, 1890, or subsequent thereto and prior to the initiation of a valid homestead claim to any portion thereof such entry shall be allowed, but if it appears, that one or more legal subdivisions thereof shall not have been so occupied, at the time named, such subdivisions shall be excluded from such entry, and a hearing will be had to determine, under the law and rules of practice, who is the party rightfully entitled to make entry of the same." By the decision of this department, the whole of the W. ½ of said section was awarded to the townsite claimants, and in that decision all parties acquiesced except Bockfinger, who files the motion for review now under consideration. The alleged errors are not set forth in short and explicit statements, but are presented in the following form:

Matters of Fact.

1. That it was error of fact to find as follows:

"The settlers of the townsite of West Guthrie selected the W. ½ of sec. 8, 16 N. 2 W., as the site of a town at about 4 o'clock p. m., April 22, 1889. Town meetings were held that day and the next, and organization effected; taxes collected from those who had on the first

pay located and claimed lots; officers were selected to preside over and control the affairs of the town, and organization for municipal purposes has been kept up continuously since that date. There were at least one hundred people who selected this tract for town purposes on April 22, 1889, before any agricultural claimant made settlement or claim on either of said tracts, except Cohn, Feagins, and Taylor, who were not eligible to make settlement, etc."

After the settlers of West Guthrie had made their selection of the W. ½ of said section for townsite purposes and taken possession thereof on April 22, at about 4 o'clock p. m., the time had passed when any one could initiate a homestead claim for any part thereof.

2. That it was error of fact to find as follows, concerning the Commissioner's decision:

"The voluminous record in this case has been examined, and it is found that your decision appealed from contains a succinct statement of the facts in the case."

49 *Errors of Law.*

1. That it was error of law to hold as follows:

"But I cannot affirm that part of your decision holding that townsite entries cannot be made under the Oklahoma townsite act of May 14, 1890, (26 Stat., 109), for legal subdivisions not actually occupied for municipal purposes by the townsite at the date of the passage of the act above cited. Under said act 100 people or more may select 320 acres of land in Oklahoma Territory for a townsite, although they may not at the date of the selection or of the townsite act use such smallest subdivisions thereof for municipal purposes."

2. "After the settlers of West Guthrie had made their selection of the W. ½ of said section for townsite purposes and taken possession thereof on April 22, at about 4 o'clock p. m. the time had passed when any one could initiate a homestead claim for any part thereof, and the fact that a portion of the tract embracing about 120 acres has not yet been settled upon as a place of residence will not prevent said portion from being included in the townsite entry."

"Towns are not built in a day, and from the very nature of things they should not be required to improve each of the smallest subdivisions in their selection before making entry, any more than a homestead claimant should be required to improve each 40 acres making up his homestead before making his final entry."

It may be profitable before proceeding farther in the consideration of this motion to consider and determine the status occupied by Bockfinger in the case. He has made no application to enter the land, and does not claim to have made a settlement thereon until April 20, 1890, nearly a year after the application by the townsite claimants was filed. While his claim is mainly based and argued on the theory that he acquired a right of entry by virtue of his contest affidavit attacking Feagins' entry, yet it is alleged as an alternate claim that the townsite claimants had not settled upon and occupied any portion of the said quarter section prior to his settle-

ment, and that therefore he acquired a right to said land by virtue of such settlement immediately upon the cancellation of Feagins' entry. This claim cannot be sustained. Whatever may be concluded as to the land claimed by the townsite on April 22, 1889, or prior to the filing of Beckfinger's contest affidavit
50 on May 24, 1889, it is clear that this particular tract was claimed long prior to Beckfinger's settlement, for it was included in the plat filed with the application to make the townsite entry, was described in that application and was a part of the land contemplated by the order for a hearing in this case, which was made October 23, 1889, all long prior to Beckfinger's settlement. He certainly had notice of the claim of the town to this tract before he performed any act of settlement on said land. Again, whatever may have been the number of people located on the west half of said section up to, and at the date of Beckfinger's affidavit against Feagins' entry, it is indisputable that at the time of filing the townsite application there was a large number of people upon the N. W. ¼ of said section, certainly sufficient to entitle them to take the entire west half thereof, and that this number steadily increased up to the time of the hearing and of Beckfinger's settlement. It may be true that at the date of the hearing there was no one on the S. W. ¼ claiming as a townsite settler, but if true, this condition of affairs is satisfactorily explained by the fact established by the testimony that all such as were thereon were removed by the military on or about June 15, 1889. It was in my opinion, the intention to acquire said last-named quarter section of land for townsite purposes, and this intention was shown by settlement thereon, by surveying a part of it, and by including the whole in the plat filed with the townsite application, of all of which Beckfinger had actual notice, or is chargeable with notice prior to his settlement. That the parties in interest desisted from following up their settlement, survey &c. in the face of the action of the military authorities, is not to be held as a abandonment of their claims, especially in view of the fact that they have continuously asserted their rights, and sought an adjudication thereof through the proper processes of a trial and judgment of the different tribunals of this department. Under this view of the case
51 it may be doubted if it be necessary to invoke the doctrine laid down in the following quotation from the departmental decision complained of, referring to the act of May 14, 1890 (926 Stat. 109) viz:

"Under said act one hundred people, or more, may select three hundred and twenty acres of land in Oklahoma Territory for a townsite, although they may not, at the date of the selection, or of the townsite act, use each smallest subdivision thereof for municipal purposes. Townsite of Norman *v.* Robert Q. Blakeney, (13 L. D. 399); William H. Walker *v.* Townsite of Lexington, (13 L. D. 404)."

The correctness of which proposition is denied in the argument in support of this motion. Whether or not it be necessary to invoke this doctrine it is sufficient to say that this question was fully discussed in the cases cited, and I see no good reason for receding from

the position then taken, or indeed any necessity for entering again upon an extended discussion thereof. In arguing this branch of the case it is insisted that there can be no selection for townsite purposes in Oklahoma except by actual settlement and occupancy, and the counsel formulate the following deductions from the opinion of Attorney General Cushing, cited and quoted from in the case of Walker v. Lexington Townsite *supra* viz:

"That the selection must be by settlement and occupancy.

That the inchoate right begins from the beginning of such occupation.

That 'the ultimate sufficiency of that occupation is to be determined in part from subsequent facts, which consummate the occupation, and also demonstrate its *bona fides*.'"

Immediately following is the statement by counsel in these words:

"The municipal occupation if sufficiently evidenced by an actual survey upon the ground, of said town, into streets, alleys, and blocks, or the publication of a plat of same evidencing the connection therewith of the public surveys, so as to give notice to others."

This last had at least been done long before Bockfinger's settlement, and hence, under their theory of the law, he can claim nothing as against the townsite claimants by virtue of his settlement, but must succeed, if at all, because of some right secured by filing his contest affidavit.

52 I find no error, either in law or fact, in said decision by which Bockfinger, in his character of settler, has been injured, and hence the motion in question will not be allowed, in so far as it is based upon his rights as such settler.

It becomes necessary now to consider his status otherwise and determine whether he has secured such a standing in the case by reason of having filed the affidavit against Feagins' entry as to be entitled to prosecute the motion in question, and if this be answered in the affirmative, whether there is such error in said decision as deprives him of right in his character of contestant.

The act of May 14, 1880 921 Stat. 140, contains among others the following provision:

"In all cases where any person has contested, paid the land-office fees, and secured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register and receiver of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands."

In this case Bockfinger presented his affidavit of contest, containing the same allegations made in affidavits filed ahead of his, and it was received by the local officers to be held until the preceding contest should be disposed of. It was never acted upon or considered as a contest, he did not pay the land-office fees, and he did not procure the cancellation of Feagins' entry. He has never reached the place where he should properly be called a contestant, his status being only that of an applicant to be allowed to proceed against the existing entry, whose application was not in a condition to be

acted upon, but must assuredly be held in abeyance for the time being. Surely he acquired no vested right to make entry for the land thereby. It must be borne in mind also that his charge was the same as that in the prior affidavit, so that if proceedings under such former affidavit had been carried to a final judgment, Bockfinger could have secured nothing under his application to contest; because had that judgment been for the
53 cancellation of the entry, his application must have been denied, as there would have been no entry to proceed against, (Hyde *et al.* v. Eaton *et al.* (12 L. D. 157), and if the judgment had been in favor of the entryman, the same result would have followed, because an issue once tried and determined cannot be made the basis of a second contest (Busch v. Davis 12 L. D. 317). There is nothing in this case to take it out of the operation of the general rule. Bockfinger's relation to this case based upon his contest affidavit is entirely too remote to justify the conclusion that he has been injured by the decision complained of, even if the errors alleged therein do exist, which it is not intended to say hereby is the fact, and hence there is no sufficient reason apparent for granting his motion.

Said motion, asking that the departmental decision of December 16, 1891, be reversed and set aside for the reasons herein set forth must be, and the same is hereby denied.

The attorneys for Bockfinger have filed a motion for rehearing in this case on the ground of newly discovered evidence, supporting the same by affidavits of various parties. These affidavits are to the effect that no selection was made of the S. W. ¼ of sec. 8 for townsite purposes prior to June 15, 1889. Counter-affidavits have been filed, but I do not consider it necessary at this time to discuss the contradictions between the two sets or the fact that some of the parties making the affidavits in support of this motion were examined as witnesses at the hearing heretofore had.

It may be admitted for the purpose of the present discussion that these affidavits set forth the facts actually existing, and still they afford no sufficient reason for a new hearing in view of the status we have determined Bockfinger occupies in this case. They do not controvert the conclusion that the land was actually settled by the townsite prior to Bockfinger's settlement, but on the other
54 hand, tend strongly to support it, and hence do not aid his claim as a settler. And, if as heretofore concluded, he has secured no right as a contestant to enter said land, a new hearing which would establish the facts as set forth in these affidavits could not confer such a right on him. For these reasons the motion for a rehearing is hereby denied.

The papers accompanying your letter "G" of January 23, 1892, and the other papers in the case are herewith returned.

Very respectfully,

(Signed) JOHN W. NOBLE, *Secretary.*

55 Ex. F.

Before the Hon. Secretary of the Interior, Washington, D. C.

TOWNSITE OF WEST GUTHRIE }
vs.
MARK S. COHN ET AL. }

Involving title to S. W. ¼, sec. 8, town 16, range 2 W., Logan county, Oklahoma Territory.

In the matter of the application for a rehearing in the above-entitled cause by H. H. Bockfinger the following affidavit is submitted.

STATE OF KANSAS, }
County of Cowley, } ss:

N. A. Haight after being first duly sworn upon his oath in the form of law deposes and states that he is a practica*ble* surveyor and that as such he was employed by the mayor and council of West Guthrie in April, 1889, to survey all that portion of the northeast quarter of section eight west of the Cottonwood river in township No. sixteen (16) and range No. two (2) west. Such lands were then supposed to be and claimed to be West Guthrie. This employment was by James Dooley then mayor of West Guthrie and the council thereof.

That on or about the 7th day of May, 1889, and after affiant had made the survey of West Guthrie he was directed by said mayor and council to survey the northwest quarter of section eight as a part of said townsite of West Guthrie.

Affiant further says that he never was directed by the mayor and council to survey the southwest quarter of said section eight and no part of that quarter section was surveyed by affiant.

Affiant further says that he was instructed to prepare his blue prints of such survey with the said southwest quarter included in it as it was thought they might want to include that quarter in said townsite at some future time. The streets and blocks of West Guthrie being laid out so as to correspond with those of Guthrie proper, it was deemed advisable to make the blue prints show the same on the southwest quarter, but there was no survey ordered by said mayor and council thereof, and none ever was made except on paper as aforesaid.

Affiant further states that no part of said southwest quarter was ever included in or made a part of any townsite and that it was always understood and known to be no part thereof at that time.

(Signed) N. A. HAIGHT.

Subscribed and sworn to before me this 22nd day of August, 1892.

[SEAL.] J. B. FISHBACK,
County Clerk, Cowley Co., Kansas.

56 Before the Honorable Secretary of the Interior.

TOWNSITE SETTLERS OF WEST GUTHRIE, OKLAHOMA TERRITORY,
vs.
MARK S. COHN ET AL.

Involving the west half of section 8, township 16 north, range 2 west, Guthrie land district, Oklahoma Territory.

James D. Furber being first duly sworn on his oath, says: At the first election held for city officers in April A. D. 1889, one J. R. Bradley was elected city clerk for what was as we then called "the city of Guthrie," and which was composed of that part of what is now "Guthrie proper" lying west of the Cottonwood river of the east half of section 8, township 16, N. R. 2 west Indian meridian.

This election was to the best of my recollection held on April 23rd, 1889, and immediately after said election (which was also held for the election of a mayor and city council) the said J. R. Bradley resigned said office of city clerk and this affiant was by said city council duly appointed city clerk to fill said vacancy, that said J. R. Bradley kept the minutes and records of only one of the meetings of said city council, and this affiant was the sole and only custodian of and kept the minutes and proceedings of all subsequent meetings of said city council up to the 5th day of June A. D. 1889, at which time there was a new set of city officers elected. That one James Dooley was the first mayor elected and that one W. T. Cannon was elected June 5th 1889.

This affiant further states that about the time of said election of June 5th, 1889, he (this affiant) left said city of Guthrie. Affiant further states that up to the time of said election of June 5th, 1889, he was the sole and only clerk of said city or that part west
57 of the Cottonwood river then called by us "Guthrie" but which organization was afterwards removed to the northwest quarter of section 8, township 16, N. R. 2 west and called "West Guthrie."

Affiant further says that up to and including the 5th of June, 1889, the records of said "city of Guthrie" afterwards and now known as "West Guthrie" did not show any selection of the southwest quarter of section 8, township 16, N. R. 2 west by said city council for townsite purposes nor was in fact any such selection made up to the time of said second election of June 5, 1889.

Affiant further states that he, within the last few days informed contestant Henry H. Bockfinger of the above facts, and that he (this affiant) had in his possession said original record, and that it did not show the selection of said southwest quarter of said section 8, and that at the time he so informed him he believed he did have said records in his trunk at Topeka, Kansas, but upon examining the same he has been unable to find said record.

Affiant further states that he has on this 22nd day of March, 1892, talked with said W. T. Cannon who was on June 5th, 1889, elected mayor of said city of what is now known as "West Guthrie" (and

who succeeded James Dooley the first mayor elected) and asked said Cannon if he knew where said original record was, and that said Cannon informed him that he (Cannon) did not have it now nor did he ever see it, and did not know where it was, and that neither he nor his city council ever had it, but that the only record they ever had of the proceedings of the city council of West Guthrie was a record which they hired the former and first mayor, James Dooley to make up from his memory of the proceedings of said council prior to June 5th, 1889, and that they paid him for the same the sum of five dollars.

Affiant further states that he on this 22nd day of March, 1892, talked with the said James Dooley above mentioned and who made said records above referred to, and said Dooley admitted to him and told him that he did make up said records for said city
58 council as stated by said Cannon, from memory and that they were the same records of which a copy was introduced in evidence before the register and receiver of the Guthrie land office on the hearing had therein, in this case. Affiant further states that he has on this 22nd day of March 1892, examined the records of which he is informed and believes a copy was introduced before the land office at Guthrie, Oklahoma on the trial of this case, and has examined the signatures purporting to have been signed by him as city clerk up to June 5th, 1889, and this affiant states that said record was never made or signed by him and that he never saw said record in his life before today (March 22, 1892), and all he knows about said record is as above set forth and that it is not the original record of the proceedings of said council from April 23, to June 5th, 1889, nor is it a copy of the same, as kept by this affiant and does not contain the correct proceedings of said city council as had while he was clerk and James Dooley was mayor. Affiant further states that said original record never did show the selection of the southwest quarter of section eight, township 16, N. R. 2 west of the Indian meridian by said city council for townsite purposes from the time of the first election of April 23rd, 1889, up to June 5th, 1889, and in fact no such selection was made.

(Signed) JAMES D. FURBER.

Subscribed and sworn to before me this 23rd day of March, A. D. 1892 by the above-named James D. Furber.

[SEAL.] JOHN H. HAVIGHORST,
Deputy County Clerk of Logan County, Oklahoma.

Compared by me March 24th, 1892, and I certify that this is a correct copy of the original affidavit of James D. Furber made and subscribed before me on the 23rd day of March, A. D. 1892.

Witness my hand and the seal of said county of Logan this 24th day of March, 1892.

[SEAL.] JOHN H. HAVIGHORST,
Deputy County Clerk of Logan County, Oklahoma Territory.

59 *Affidavit.*

TERRITORY OF OKLAHOMA, }
County of Logan. }

THE WEST GUTHRIE TOWNSITE SETTLERS }
vs.
JAMES W. FEAGINS ET AL. }

involving the S. W. ¼ of section 8, tp. 16 N., range 2 west, I. M.

Affidavit of James W. Feagins.

James W. Feagins, of lawful age, being duly sworn upon his oath deposes and says:

That he is and was one of the defendants in the above-entitled cause claiming the land as above described as a homestead right under the homestead laws of the United States; that he is informed and believes that an agreement was entered into and executed between his counsel in his case before the local land office and the council for the townsite settlers, to the effect that the said tract of land be an- to be occupied for townsite purposes by townsite claimants at the hour of 4 o'clock p. m. A. D. 1889; the alleged fact referred to in said agreement of the townsite settlers being at the time above mentioned, was not and is not true, and said agreement *is* made was made without affiant's knowledge or consent. He, affiant, had continuously occupied and resided upon said tract of land from April 22nd, 1889, up to the present time; that he had due opportunity of observing and knowing the condition of said land with reference to settlement of occupancy from April 22nd, 1889, to about the 18th day of June, 1889, (and afterwards). And that the first intimation or knowledge that he ever had of the claim of any townsite settlers was on or about the 18th day of June, 1889, when he was informed that the so-called townsite settlers of West Guthrie had filed an application with the local land office at Guthrié, Oklahoma Territory, for said tract of land. Affiant further states that the
60 land was never occupied by any one up to the time of the decision of the honorable Secretary of the Interior in said case to date of December 16th, 1891, other than by the homestead claimants and a few campers who stopped in a little nook or bend of the Cottonwood river in the northeast corner of said tract of land, which few campers were removed from said location in the month of June, 1889.

(Signed) JAMES W. FEAGINS.

Subscribed and sworn to before me this 9th day of February, 1892.

(Signed) JOHN S. CALHOUN,
[SEAL.] *Probate Judge.*

My commission expires ——.

6—175

61 Before the Honorable Secretary of the Interior.

TOWNSITE SETTLERS OF WEST GUTHRIE, OKLAHOMA TERRITORY,
vs.
MARK S. COHN ET AL.

Involving the west half of section 8, township 16 N., range 2 west, Guthrie land district, Oklahoma Territory.

Charles H. Griffith being first duly sworn says: I was on or about the 24th day of April, 1889, elected as one of the members of the city council of that part of what is now "Guthrie proper," lying west of the Cottonwood river or rather that part of the E. ½ of section 8, township 16, N. range 2 west lying west of the Cottonwood river, and some time in the first part of May, 1889, we found out where the west line of Guthrie proper was, and that we were really in Guthrie proper, we then some time from the 5th to the 10th of May concluded to examine into the title to the N. W. ¼ of sec. 8, township 16, N. R. 2 W. and see how it was held, and found that the homesteader one T. J. Taylor was a deputy U. S. marshal and a sooner besides. So after talking the matter over on or about May 7th, 1889, about forty or fifty persons assembled at the office of James Dooley which said office was on the north end of lot 6 in block 39, of what is now Guthrie proper, where Dooley's office had been and where the council had met from the time of the election and organization of the first city council on April 23rd or 24th, 1889, and from there the start was made and the run made over on to the N. W. ¼ of sec. 8, tp. 16 N. R. 2 W. which was taken as the townsite of West Guthrie and on June 5th 1889, an election was held for city officers and W. T. Cannon was elected mayor. All of my interests were as I then found in Guthrie proper so I took no lots over there, yet nearly all of those who made the run owned lots in Guthrie proper and also took lots in West Guthrie also.

While I was a member of the city council from April 24th
62 to June 5th 1889, no selection of the southwest quarter of section 8, township 16, N. R. 2 west was ever made for townsite purposes and the only talk I ever remember of having about the S. W. ¼, was when some of us was talking — getting it for a driving park and fair grounds. At the time the run was made from Dooley's office over on the N. W. ¼, of section 8, no attempt was made to take the S. W. ¼ of section 8 nor in fact was it thought of, what we wanted was the land north and west of where we *was*, and it was all any one attempted to take or claim.

(Signed) C. H. GRIFFITH.

Subscribed and sworn to before me this 25th day of March A. D. 1889, by the said Charles H. Griffith who is personally known to me.

(Signed) JOHN H. HAVIGHORST,
[SEAL.] *Deputy County Clerk of Logan County, Oklahoma Territory.*

63 TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

THE TOWNSITE OF WEST GUTHRIE }
vs. } Affidavit.
MARK S. COHN ET AL. }

James Dooley of lawful age, being duly sworn, upon oath deposes and says:

I am the same person who was in April, 1889, selected as mayor, at a meeting of the townsite claimants who were then west of the Cottonwood river, and on that part of section eight (8), township sixteen (16) north range two (2) west, lying north of the half-section line running east and west through said section eight (8). At the time I was elected mayor as aforesaid, the location at that place was styled by the people there "West Guthrie." I further state that on or before April 24, 1889, Mr. Haight was appointed surveyor, and he made a report about ten (10) days thereafter. At that time and up to the 7th day of May, 1889, the people located on the ground that was styled West Guthrie were upon the northeast quarter of section eight (8), in township and range above named, west of the Cottonwood river, and had not laid claim for townsite purposes to any land lying to the westward. When the said surveyor made his report as above stated, he did not present or return or file with the city officials of West Guthrie aforesaid, any plat or sketch of the ground occupied as West Guthrie aforesaid, nor did he, to my knowledge, prepare any plat of what was styled West Guthrie, until in the month of June, 1889, and when said surveyor made his report, no plat or sketch was drawn or made to my knowledge, of the ground occupied by the people of West Guthrie. In pursuance of said report, it was the intention of the people located upon what was then known as West Guthrie to join up to the Cotton-
64 wood river on the west side so that the people were on ground adjacent to the remainder of the city of Guthrie lying east of the Cottonwood river, and the idea of separation into West Guthrie was conceived with the Cottonwood river as the division line between Guthrie proper and West Guthrie.

I do further state that the commencement of surveying by the surveyor mentioned on the ground west of the Cottonwood river was not commenced before April 25, 1889, and that for some days thereafter the said surveyor was engaged in surveying that part of the southeast quarter of section eight (8) township and range above named, west of the Cottonwood river. I further state that the occupation of the northwest quarter of section eight (8) above named for townsite purposes was conceived after the occupation for that purpose of the southeast quarter of section eight (8) lying west of the Cottonwood river, and that a run was made from the original location of West Guthrie which I have named, on the 7th day of May, 1889, over upon the northwest quarter of said section eight (8), and that at that time, there was no occupation of the southwest

quarter of section eight (8) for townsite purposes, nor had there been any up to that date.

I further state that up to the first part of June, 1889, there had never been a return or presentation to the city officials of West Guthrie, a surveyor's plat, or any plat, showing the location and boundaries of lots, blocks, streets and alleys of the west half of section eight (8) aforesaid, and that at the time I retired from the office of mayor of West Guthrie on June 5, 1889, there never had been a survey of the southwest quarter of section eight (8) township sixteen (16) north range (2) west into lots, blocks, streets and alleys.

I further state that I never saw the surveyor's plat which showed the west half of section eight (8) divided into lots, blocks, streets and alleys, until the fore part of June, 1889, and so far as my
65 knowledge extends no such plat was ever prepared before that time.

(Signed) JAMES DOOLEY.

Subscribed and sworn to before me this 21st day of May, 1892, by the said James Dooley, who is personally known to me.

(Signed) J. H. HAVIGHORST,
Deputy County Clerk of Logan County, Oklahoma Territory.

66 Before the Hon. Secretary of the Interior, Washington, D. C.

TOWNSITE OF WEST GUTHRIE }
vs.
MARK S. COHN ET AL. }

Involving title to S. W. ¼ S. 8, Tp. 16 N., R. 2 W., of I. M., Ok. Ter.

In the matter of the application for rehearing in the above-entitled cause by H. H. Bockfinger, the following affidavit is submitted.

TERRITORY OF OKLAHOMA, }
County of Logan. }

Clement H. Cannon of lawful age being first duly sworn according to law deposes and says that during the spring and summer of 1889, he was a resident of Capitol Hill which is one of the additions to Guthrie, Oklahoma Territory, and that during the month of June, 1889, he was employed by the second council elected by the people of West Guthrie who were elected on the 5th day of June, 1889, and who were at that time occupying the N. W. ¼ sec. 8, tp. 16, N. R. 2 W. and who were occupying or laying claim to the S. W. ¼ section 8, as a townsite at that time.

Affiant further states that after he was employed as counsel to file an application for the people who were then occupying the N. W. ¼ sec. 8, which was on or about the 15th or 16th days of June, 1889, he was requested by the people and the city council which was elected by the people on the 5th day of June to file a townsite application

for said people who were then occupying the N. W. ¼ sec. 8, tp. 16 N. R. 2 W. for said quarter.

Affiant further states that upon the request of said people to file the said application for said N. W. ¼ sec. 8, he suggested to the city council who were elected on the 5th day of June by the people who were occupying the N. W. ¼ said sec. 8, — include in their application the S. W. ¼ of said sec. 8, also.

Affiant further states that up to the time he made the application for a townsite for the use and benefit of the people then oc-
67 cupying the N. W. ¼, said sec. 8, said people were not claiming the S. W. ¼ said sec. 8, to his knowledge but upon the suggestion of this affiant as counsel for said people they laid claim thereto by filing a townsite application for the west half of said sec. 8 and further affiant saith not.

(Signed) CLEMENT H. CANNON.

Subscribed and sworn to before me this 14th day of July, 1892.

(Signed) M. D. CHERRY,
Notary Public.

My commission expires September 29th, 1895.

68 STATE OF IOWA, }
County of Fayette, } *ss:*

This day personally appeared before me a notary public in and for said county and State, James Stewart of lawful age who being first duly sworn according to law deposes and says as follows: I am the James Stewart who was a councilman of that part of Guthrie proper in Oklahoma Territory lying west of the Cottonwood river, which was from April 23rd to June 5th, 1889, the supposed city of West Guthrie. I arrived at what is now known as the city of Guthrie, Oklahoma Territory, about 4 p. m. of April 22nd, 1889, and went west of the Cottonwood river where about twenty to thirty men had assembled.

After talking together for some time and staking out lots immediately west of the Cottonwood river but on the N. E. ¼, of sec. 8, township 16 N. R. 2 W. I. M. I with others returned east of the Cottonwood river that night and remained over night there, where the thousands who went to Guthrie on that day were assembled.

After remaining over night there I with others returned next morning west of the Cottonwood with those who had staked off lots there the previous day.

We held a meeting and talked of forming a city government and designated that part where we had staked West Guthrie, but owing to our limited numbers, (there being but seventy-five or eighty present) we determined to postpone electing officers until the following day which we done. And on April 24th, 1889, James Dooley was elected mayor by a *viva voce* vote, as *was, as was* all the other officers including myself as one of the councilman. Mayor Dooley in a few days erected an office which afterwards proved to be in Guthrie proper,

but in which all of our meetings were held and business transacted. On the 7th day of May we determined to consider the validity of our organization, on account of our being in Guthrie proper and at said meeting we determined to take possession of the northwest
69 quarter of section 8, township 16, N. R. 2 W. for townsite purposes and we did take possession of it and built a mayor's office just across the half-section line, during all this time there was no effort made by the West Guthrie *de facto* city government to select, settle upon, or take possession of the southwest quarter of section 8, tp. 16, N. R. 2 W. as it was occupied and claimed by Feagins and Maples who were homesteaders. And besides owing to our limited numbers we did not think we could hold more than the N. W. ¼ sec. 8, there not being over 150 people west of the Cottonwood river up to that time, and there being as we then found out about 90 acres of Guthrie proper west of the Cottonwood we concluded that was all we could hold, and besides no one questioned the rights of the homesteaders on the S. W. ¼, or thought of taking it. We employed a surveyor to survey out the townsite as selected by us and he did so, but never made any survey of the S. W. ¼ of sec. 8, nor was he ever ordered to do so while I was a member of the city council up to June 5th, 1889, as no selection of said quarter section was made up to that time.

I never removed my residence to the N. W. ¼ of sec. 8 but acted as one of the councilmen of "West Guthrie" after its removal to the N. W. ¼ of sec. 8, up to June 5th, 1889, and resided all the time in "Guthrie proper" where I first staked out lots on the evening of April 22, 1889. And on June 4th, 1889, I was elected a member of the "charter convention" of what is now Guthrie proper and was understood to be by every one at the time of said election.

(Signed) JAMES STEWART.

Subscribed and sworn to before me this 12th day of April 1892, by James Stewart the above affiant.

(Signed) H. P. HANCOCK,
[SEAL.] *Notary Public in and for Fayette Co., Iowa.*

70 Before the Hon. Secretary of the Interior.

TOWNSITE SETTLERS OF WEST GUTHRIE, OKLAHOMA TERRITORY, }
vs.
MARK H. COHN ET AL. }

Involving the west half of section 8, township 16 N., range 2 West, Guthrie, Oklahoma land district.

Henry H. Bockfinger of lawful age being first duly sworn on his oath says: I am the Henry H. Bockfinger mentioned in the above-entitled cause, now before the Hon. Secretary of the Interior and had taken on the 23rd day of March A. D. 1892, the testimony or affidavit of one James D. Furber who was in 1889, the city clerk of West Guthrie also on the 25th day of March the affidavit of one

Charles H. Griffith who was in 1889, a member of the city council of West Guthrie; also on the 28th day of March the affidavit of one James Dooley who was from April 23rd 1889, to June 5th 1889, mayor of West Guthrie.

Affiant further states that he never knew of the facts set forth in the affidavit of said James D. Furber, Charles H. Griffith, or James Dooley until he was informed by said James D. Furber on or about March 22nd, 1892 that those were the facts in said case and if said parties would only tell him (Bockfinger) the truth *the* would tell him what they have now testified to in said affidavits.

Affiant further states that he immediately sent said Furber to the State of Kansas to procure his trunk in which said records of the proceedings of the city council of West Guthrie from April 23rd 1889, up to June 5th, 1889, *was* supposed by said Furber to be, that said Furber got the trunk but the record was not there, that
71 said Furber at the request of the affiant went to see one Charles Day who was from April to June an officer of said West Guthrie and whom the said Furber thought might have said record. That Day was then in Guthrie but resided in Winfield, Kansas, and told said Furber that he might have said record at his home in Winfield, that affiant then sent said Furber to Winfield, Kansas to the home of said Day to see if he could not find said record Day giving him an order to his wife to let him have it if it was there but that after going there and looking over his books he returned to Guthrie and told this affiant he was unable to find said record.

This affiant further states that upon the trial of this case before the register and receiver of the land office at Guthrie when the officers of West Guthrie introduced in evidence a record of their official acts this affiant thought said record was the original record or a copy of the record of their proceedings as kept by James D. Furber the clerk of West Guthrie and did not know to the contrary until the 22nd day of March A. D. 1892, when he was informed by said Furber that it was not the record kept by him nor a correct copy of said record.

Affiant further states that he was informed by James Dooley who was the mayor of West Guthrie from April 23rd 1889, to June 5th, 1889, that at the time of the trial of said cause in the land office at Guthrie he (Dooley) was taken by the officers of West Guthrie to go upon the witness stand as a witness for West Guthrie, but that he (Dooley) informed them it would not do for them to put him on the stand as his testimony would injure their case. That said Dooley only informed this affiant of this on the 28th day of March 1892.

This affiant states that he has at all times and in every manner possible used due diligence to procure truthful evidence in this case that he did not know of and could not procure the evidence of said Dooley, Furber and Griffith as testified by them in their affidavits mentioned herein on the trial of said case before the land
72 office at Guthrie, Oklahoma.

(Signed) HENRY H. BOCKFINGER.

Subscribed and sworn to before me a notary public in and for the county of Logan, Oklahoma Territory, by the above-named Henry H. Bockfinger this 29th day of March, 1892.

[SEAL.] M. B. CHERRY,
Notary Public.

Com. expires Sept. 29, 1895.

(Endorsed:) 1263. Henry H. Bockfinger *vs.* John Foster *et al.* Filed Feb. 25, 1893. T. G. Risley, clerk by S. K. Van Voorhees, deputy.

73 TERRITORY OF OKLAHOMA, } *ss.*:
County of Logan, }

The Territory of Oklahoma to the sheriff of said county, Greeting

You are hereby commanded to notify John W. Foster, W. S. Robertson and A. C. Schnell to be and appear before the district court of said county of Logan, to be holden, at Guthrie, in said county, on the 9th day of March, A. D. 1893, to answer a certain complaint in a civil action, filed in said court, wherein Henry H. Bockfinger is plaintiff and John W. Foster, W. S. Robertson and A. C. Schnell — Townsite Board No. Six is defendant; and hereof make due return as the law directs.

Witness T. G. Risley clerk of said court, and the seal thereof, at Guthrie this 25th day of Feb'y A. D. 1893.

[SEAL.]

(Signed) T. G. RISLEY, *Clerk*,
By S. K. VAN VOORHEES, *Deputy*.

TERRITORY OF OKLAHOMA, } *ss.*:
Logan County, }

I served the within writ of summon-on the within-named defendants by leaving a true copy thereof at their place of residence they being residents of this county on February 25, 1893.

(Signed) W. W. PAINTER, *Sheriff*.
(Signed) W. E. TANSEY, *Deputy*.

Fees.

Service and return first person 50. Service on two additional 25 cts. each 1.00 and three copies 25 each 75. Total services $1.75.

(Endorsed on back:) Summons district court Logan county No. 1263 Bockfinger, plaintiff *vs.* John Foster *et al.* defendant-.
74 Returnable May 1893. Returned filed Feb. 25 1893. (Signed) T. G. Risley, clerk, by S. K. Van Voorhees, deputy.

75 In the District Court of the First Judicial District, Holding Terms at Guthrie in and for Logan County, Oklahoma Territory, September Term, 1892.

HENRY H. BOCKFINGER, Plaintiff,
vs.
JOHN FOSTER, W. S. ROBERTSON, and A. C. Schnell, Trustees of Townsite Board No. Six, Defendants. } *Lis Pendens* Notice.

Notice is hereby given that the above-named plaintiff, Henry H. Bockfinger has filed his complaint against the above-named defendants, John W. Foster, W. S. Robertson and A. C. Schnell, trustees of Townsite Board No. Six (6), assigned to West Guthrie, Oklahoma Territory, to have the said John W. Foster, W. S. Robertson and A. C. Schnell, as such trustees to be declared to be the trustees of the said Henry H. Bockfinger, holding the legal title in and to the southwest quarter of section eight (8), township sixteen (16), north of range two (2) west, in Logan county, Oklahoma Territory, and to recover the legal title for the said Henry H. Bockfinger in and to said southwest quarter of section eight (8), township sixteen (16), north of range two (2) west, in said Logan county, Oklahoma Territory, and quieting the title to said tract of land in the said Henry H. Bockfinger and to require the said defendants John W. Foster, W. S. Robertson and A. C. Schnell, trustees to deed the said tract of land to the said Henry H. Bockfinger and for the judgment of the court that all of said defendants have no right or interest in said tract of land, but that the said tract of land is the property of the plaintiff, who is the equitable and legal owner thereof. For fuller claim of the said Henry H. Bockfinger, see the complaint and the exhibits on file in the above-entitled cause.

(Signed) HENRY H. BOCKFINGER.
C. B. FREEMAN,
BIERER & COTTERAL,
His Attorneys.

(Endorsed:) Henry H. Bockfinger *vs.* John W. Foster *et al.*
76 Filed 2.35 p. m., Feb. 25, 1893. T. G. Risley, clerk dist. court. Recorded *lis pendens.*
(Endorsed on back:) Henry H. Bockfinger *vs.* John W. Foster *et al.* Filed 2.35 p. m., Feb. 25, 1893. T. G. Risley, clerk dist. court. *Record- lis pendens.*

77 H. H. BOCKFINGER
vs.
JOHN FOSTER ET AL. } # 1263.

Motion to Require Plaintiff to Separately State and Number His Causes of Action.

Now come John Foster, W. S. Robertson and A. C. Schnell defendants in the above-entitled action and moves the court to require

the plaintiff to separately state and number the various causes of action stated in his complaint.

(Signed) JOHN FOSTER,
W. S. ROBERTSON, AND
A. C. SCHNELL,
(Signed) By HORACE SPEED,
U. S. Attorney.

(Endorsed on back :) # 1263. District court. H. H. Bockfinger *vs.* John Foster *et al.* townsite trustees. Motion of defendants to separately state and number the several causes of action set up in the complaint. Horace Speed, U. S. att'y for defendants.

78 TERRITORY OF OKLAHOMA, } *ss*:
County of Logan, }

In the District Court.

HENRY H. BOCKFINGER }
vs. } # 1263.
JOHN FOSTER ET AL. }

Demur-er.

The defendants John Foster, W. S. Robertson, and A. C. Schnell, townsite trustees, board # 6 of Oklahoma Territory demur to the complaint herein and say that the complaint does not state a cause of action against these trustees.

2nd. Said defendants further demur to the complaint for the reason that this court has not jurisdiction of the subject of the action.

3rd. Said defendants further demur for the reason that this court has not jurisdiction of these defendants in their capacities as trustees of Townsite Board # 6 as set out in the complaint.

4th. Said defendants further demur for the reason that there is a defect of parties defendant in this, that each and every of the lot claimants upon the land described in the complaint, should be made parties defendant in this action.

JOHN FOSTER,
W. S. ROBERTSON, AND
A. C. SCHNELL,
Trustees Townsite Board # 6,
(Signed) By HORACE SPEED,
U. S. Attorney, Attorney for Defendants.

79 NOTE.—The complaint alleges that Bockfinger filed his contest in the U. S. land office but it seems that he never had any homestead entry upon the land. It further appears that the decision of the land office was against him in part, and that he appealed the case, and alleges that the other parties did not appeal as to that part of the decision of the land office which was not in his favor, but when the case was carried up to the Commis-

sioner and the Secretary, the decision of the land office was wholly reversed as to him upon the ground that upon the evidence he was not entitled to the whole nor any part of the land. All the land was therefore given to the West Guthrie Townsite Company which surveyed, platted and settled it. That thereafter the Secretary of the Interior conveyed title of the United States to the townsite board which holds title to the land. That the trustees are trustees under an act of Congress for Oklahoma townsites.

The statement is that (page 18) "the defendants in this cause as townsite trustees for the townsite of West Guthrie entered the said tract of land at the land office at Guthrie, Oklahoma Territory and that since said time prior to the filing of this complaint, received a patent to said land from the Government and now hold title to said land."

The court must judicially recognize the fact under the law that this patent is for the benefit of the townsite claimants.

The next sentence therefore of the complaint, "that said trustees hold the title to said land as trustees for the use and benefit of this plaintiff, who is the legal and equitable owner of said land" is not a pleading of fact, but of an unfounded conclusion of law. Leaving out that sentence the case comes squarely within the decision of McDaid *v.* Oklahoma, 150 U. S. p. 200, and Knight *v.* United States Land Association, 142 U. S. 161.

80 The courts have no authority until after the title passes out of the Government, to direct Government officers to whom they shall award, or to whom they shall make deed for Government lands.

The demurrer admits each fact well pleaded, but does not admit conclusions ill pleaded.

The facts upon the face of the complaint show that the defendants hold the land as townsite trustees for the townsite settlers, and cannot convey it, and have not the power or authority to convey it, to any person or persons except persons who apply for it under this act.

The allegations therefore that these defendants hold this land which has been conveyed to them for townsite purposes, as trustees, for the homestead settler, is certainly not good pleading and cannot be so treated by the court. It would be just as reasonable to set out a suit upon a promissory note, and conclude that therefore the defendant held his farm in trust for the payee of the note.

The townsite claimants, not the trustees, are the proper and necessary parties defendant. Litchfield *v.* Register and Receiver, 9 Wall. 575.

(Endorsed on back:) Henry H. Bockfinger *vs.* John Foster *et al.* In the district court. Demurrer. Filed Apr. 25 1894 Louis E. Pitts clerk dist. court. Horace Speed, U. S. attorney, att'y for def'ts.

81 Journal No. 5, page 338.

March Term, 1893.

MONDAY, *May* 15, 1893.

H. H. BOCKFINGER
vs.
JOHN FOSTER ET AL. } # 1263.

Rule to plead by May 16th, 1893.

Journal No. 5, page 341.

March Term, 1893.

TUESDAY, *May 16th*, 1893.

HENRY H. BOCKFINGER
v.
JOHN FOSTER ET AL. } # 1263.

Motion filed by Horace Speed on behalf of defendants to require plaintiff to separately state and number the several causes of action set up in *their* complaint.

Journal No. 7, page 123.

APRIL 16TH, 1894.

H. H. BOCKFINGER
—
JOHN FOSTER ET AL. } 1263.

Defendants' motion to cause plaintiff to separately state and number causes of action overruled and exception.

Defendants ruled to plead in 10 days. Cause set for hearing on May 9, at 9 a. m.

Journal No. 7, page 231.

MAY 12, 1894.

H. H. BOCKFINGER
—
JOHN FOSTER ET AL. } 1263.

Case continued until July session for argument on demur-er.

Journal No. 7, page 445.

SEPTEMBER 17TH, 1894.

H. H. BOCKFINGER
—
JOHN FOSTER ET AL. } # 1263.

Set for hearing on demur-er on Oct. 1st, '94, at 9 a. m.

82 Journal No. 7, page 512.

OCTOBER 1st, 1894.

H. H. BOCKFINGER } # 1263.
v.
JOHN FOSTER ET AL. }

Set for argument on demur-er Oct. 15, 1894, at 9 a. m.

Journal No. 7, page 600.

OCT. 23, 1894.

H. H. BOCKFINGER }
v. } 1263.
JOHN FOSTER ET AL. }

At this time the above cause is called for hearing on the defendants' demur-er to complaint. Plaintiff appears by Keaton & Cotteral, and H. S. Cunningham, and the defendants by Horace Speed. The court having heard the arguments of counsel, sustains said demur-er, to which ruling the plaintiff duly excepts.

Journal No. 8, page 17.

5TH DAY OF NOVEMBER, 1894.

H. H. BOCKFINGER }
— } 1263.
JOHN FOSTER ET AL. }

At this time the plaintiff elects to stand on the demurrer heretofore sustained, and gives notice of an appeal to the supreme court.

83 In the District Court of Logan County, Territory of Oklahoma.

H. H. BOCKFINGER, Plaintiff, }
vs. } Judgment.
JOHN FOSTER ET AL., Defendants. }

Now on this 23rd day of October, 1894, the same being a judicial day of the regular September, 1894, term of said court, the above-entitled cause comes on for hearing upon demurrer of defendants to plaintiff's complaint, the plaintiff being present in person and by his attorneys, Keaton & Cotteral, and H. S. Cunningham, and the defendants being present by their attorney, Horace Speed, and the court being fully advised in the premises, sustains said demurrer, to which ruling of the court in sustaining said demurrer the plaintiff at the time duly excepted and excepts, and the plaintiff failing and refusing to amend his complaint, and electing to stand on same, abides said ruling, and the court renders judgment on said demurrer.

It is therefore considered, ordered and adjudged by the court that the plaintiff take nothing by this action, and that the defendants recover of the plaintiff their costs and charges in this cause laid out and expended, to all of which rulings and judgment of the court the plaintiff at the time duly excepted and excepts.

Approved.

FRANK DALE, *Judge.*

(Endorsed on back:) No. — In the district court of Logan county, Territory of Oklahoma, H. H. Bockfinger *v.* John Foster *et al.* Judgment, (recorded) filed Nov. 26, 1894, Louis E. Pitts, clerk dist. court.

84 TERRITORY OF OKLAHOMA, } ss:
Logan County, }

I, Louis E. Pitts, clerk of the district court within and for the said county of Logan, Territory of Oklahoma, do hereby certify that the foregoing 79 pages of writing are a true, correct, full and complete transcript of all the pleadings, summons, demurrers, motions, rulings, orders, judgment, papers, files, proceedings, entries and records in the cause in said court, numbered 1263, wherein Henry H. Bockfinger is plaintiff, and John W. Foster, W. S. Robertson and A. C. Schnell, trustees of Townsite Board Number Six, Oklahoma Territory, are defendants; except that, upon the written request of plaintiff, the original "Exhibit A" of plaintiff's complaint is hereto attached and made a part of this record, and I hereby certify that the same is, in all respects, complete and correct.

In witness whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Guthrie, Logan county, Oklahoma Territory, this 11th day of September, 1895.

LOUIS E. PITTS,
Clerk Dist. Court Logan County, O. T.

Filed Sept. 11, '95.
EDGAR W. JONES,
Clerk Sup. Court.

85 And afterward, to wit: at the January, 1896, term of said supreme court, on the 14th day of January, 1896, the following proceeding was had in said cause, to wit:

H. H. BOCKFINGER }
vs. } # 367.
J. W. FOSTER ET AL. }

The above cause was at this time called and continued for the term, upon motion of J. R. Keaton, of counsel for appellant.

86 And afterward, to wit: at the June, 1896, term of said supreme court, on the 2nd day of June, 1896, the following further proceeding was had in said cause, to wit:

HENRY H. BOCKFINGER
vs.
J. W. FOSTER ET AL. } # 367.

The above cause is at this time continued for the term, by agreement of counsel.

87 And afterward, to wit: at the January, 1897, term of said supreme court, on January 5, 1897, the following further proceeding was had in said cause, to wit:

HENRY H. BOCKFINGER, Appellant,
vs.
J. W. FOSTER ET AL., Appellees. } # 367.

The above cause was at this time continued for the term by agreement of counsel representing both plaintiff and defendant.

88 And afterward, to wit: at the June, 1897, term of said supreme court, on June 7, 1897, the following further proceeding was had, to wit:

HENRY H. BOCKFINGER, Appellant,
vs.
J. W. FOSTER ET AL., Appellees. } # 367.

Comes now Hon. C. R. Brooks, United States attorney, and files motion to dismiss in the above-entitled cause.

89 And afterward, to wit: at the June, 1897, term of said supreme court, on June 10th, 1897, the following further proceeding was had, in said cause, to wit:

HENRY H. BOCKFINGER, Appellant,
vs.
JOHN W. FOSTER ET AL., Appellees. } # 367.

The above cause is at this time continued for the term.

90 And afterward, to wit: at the June, 1898, term of said supreme court, on the 10th day of June, 1898, the following proceeding was had in said cause, to wit:

HENRY H. BOCKFINGER, Appellant,
v.
JOHN W. FOSTER ET AL., Appellees. } # 367.

Now this cause comes on for consideration by the court upon the motion to dismiss for want of jurisdiction; and the court having considered said motion, and being fully advised in the premises, finds that said motion should be overruled.

It is therefore ordered and adjudged by the court that the motion to dismiss herein is overruled.

It is further ordered by the court that this cause be reassigned for argument June 17th, 1898, the eleventh judicial day.

91 And afterward, to wit: at the June, 1898, term of said supreme court, on June 17, 1898, the following proceeding was had in said cause, to wit:

HENRY H. BOCKFINGER, Appellant,
vs.
JOHN W. FOSTER ET AL., Appellees. } # 367.

Comes now James R. Keaton, of counsel for plaintiff in error, and Horace Speed, counsel for defendant in error, and oral argument is made by counsel Keaton in this cause.

It is therefore ordered by the court that this cause be now submitted.

92 And afterward, to wit: at the June, 1900, term of said supreme court, on the 5th day of September, 1900, the following proceeding was had in said cause, to wit:

HENRY H. BOCKFINGER, Appellant,
vs.
JOHN W. FOSTER ET AL., Appellees. } No. 367.

And now this cause comes on for decision by the court upon the the record, briefs and oral arguments submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds that the judgment of the lower court in this cause should be affirmed at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court that the judgment of the lower court in this cause be, and the same is hereby affirmed at the cost of plaintiff in error.

And comes now Jno. H. Cotteral, of counsel for plaintiff in error and excepts to said decision, and gives notice of an appeal to the Supreme Court of the United States, and asks time to prepare the order therefor; and leave is granted.

93 Said decision in said cause reads in words and figures, as follows, to wit:

94 In the Supreme Court of the Territory of Oklahoma.

Filed September 5, 1900.

HENRY H. BOCKFINGER, Plaintiff in Error,
vs.
TOWNSITE TRUSTEES, Defendants in Error.

Syllabus.

1. *Jurisdiction Defined.*—Jurisdiction is the authority by which courts and judicial officers take cognizance of and decide cases. Power to hear and determine a cause. If a court has jurisdiction of the persons to an action, and the cause is the kind of a cause triable in such court, it has jurisdiction of the subject of the action, and the power to render any rightful judgment therein.

1. *Resulting Trust—Cestuis Qui Trust Necessary Parties, When.*—In an action against townsite trustees appointed by the Secretary of the Interior under the act of Congress of May 14, 1890 (26 Stats. at Large, 109, chap. 207), and to whom patent has issued, to declare a resulting trust in favor of a plaintiff who claims adversely to the townsite entry, even if such action would lie, the townsite-lot claimants are necessary parties to the action.

3. *Townsite Trustees Cannot Be Sued, When—Resulting Trust—Petition—Demurrer to Sustained, When.*—It is a universal rule that courts will not interfere with the actions of the Department of the Interior in its disposition of the public lands, or decree to whom patent or deed shall issue. After the Government has parted with the legal title, and the Secretary of the Interior has lost all supervisory control over such land, a party who claims a prior and superior right thereto may, under certain circumstances, maintain an action against the patentee to declare him a trustee for the benefit of such plaintiff; but townsite trustees appointed under the act of May 14th, 1890, are officers or agents of the Government, and the issuance of patent to them for a townsite and the recording of same will not operate to divest the Department of the Interior of all control over the land embraced therein. The conveyance of a townsite to such trustees is for a particular use named by Congress, and the courts cannot intercept the legal title in the hands of the Government's agents. Adverse claimants for such townsite must wait until title has lodged in the persons or put to the uses directed by Congress. Therefore such townsite trustees cannot be adjudged by a court of equity to be trustees for the use and benefit of one claiming adversely to the trust created by the act of Congress under which patent was issued to them; and a petition which discloses on its face that the trustees have not conveyed the title by deed, but still retain the same, fails to state a cause of action for a resulting trust.

95 Appeal from the district court of Logan county; Frank Dale, trial judge; affirmed.

Cotteral & Hornor and J. R. Keaton, for appellant.
Horace Speed, for appellee.

Opinion of the court by BURWELL, *J.*:

This action was commenced in the district court of Logan county by Henry H. Bockfinger against John W. Foster, W. S. Robertson and A. C. Schnell, as the trustees of Townsite Board No. 6 for Oklahoma, to declare a resulting trust. The property involved is 160 acres of land located in the city of Guthrie, being the S. W. ¼ of sec. 8, twp. 16 N., R. 2 W. I. M. or the south ½ of what was formerly known as West Guthrie.

To the plaintiff's petition a demurrer was filed on the following grounds:

1st. That the complaint did not state a cause of action
96 against the defendants; (2) that the district court had no jurisdiction of the subject of the action; (3) that said court had no jurisdiction of said defendants in their capacities as trustees of Townsite Board No. 6, as set out in the complaint; and (4) that there was a defect of parties defendant, in that each and every of the lot claimants upon the land described in the complaint were not made parties defendant in the action. On the hearing of the demurrer it was sustained by the court, and, the plaintiff thereupon electing to stand upon his complaint, judgment was rendered against him for costs, and it was adjudged that he take nothing by his action. From this judgment the defendant appealed to this court.

1. We will not consider the different grounds of the demurrer in the order stated, but will take up the second point first; for, if the court has no jurisdiction of the subject of the action, it would be useless labor, so far as this case is concerned, to pass upon the other points. This identical question, however, was squarely passed upon by this court in the case of Parker *v.* Lynch, 7 Okla. 631; and in that case it was held that if a court has jurisdiction of the persons to an action, and the cause is the kind of a cause triable in such court, it has jurisdiction of the subject of the action, and power to render any rightful judgment therein. As we discussed this question at some length in the case just cited, we shall not again review the authorities and give reasons for the rule announced, as we regard the question as settled in this court. The district court is the only court in which this kind of an action can be tried, and the parties who were made parties to the action were all before the court. Therefore the court had jurisdiction of the subject of the action. It is immaterial as to whether or not the court can render the judgment prayed. If it can legally take hold of the matter at
97 issue and *and* determine the respective rights of the parties, it has jurisdiction, regardless of what the judgment, under the law and the facts, must be.

2. It is next contended that there is a defect of parties defendant; that the occupants of the lots should have been made parties to the

action. The question is also raised that this suit will not lie against the townsite trustees at all, and this point we will determine later, but for the present it will be assumed that the action may be maintained.

It is undoubtedly the general rule that, where one brings an action against a trustee of an express trust to have a court of equity declare a resulting trust in his favor, the *cestui que trust* should be made a party defendant, so that he may show any reasons he may have why the trust should be executed pursuant to the terms of the deed, and so that he may submit to the court his equities, and have them compared and measured with those of the plaintiff. Sears *v.* Hardy 120 Mass. 524. But there are many exceptions to this general rule, and counsel for plaintiff insist that the case at bar falls within one of these exceptions; that where one claims in opposition to the trust, or where his rights antedate the creation of the trust, the beneficiary of the deed is not a necessary party. And in support of this position they cite Vetterlein *v.* Barnes, 8 Sup. Ct. Rep. 441. The case just cited lays down the general rule, and then makes an exception, and quotes from other authorities in support thereof. The learned justice who wrote the opinion expressed the views of the court in the clearest of terms, but we fear that counsel have failed to analyze his words and comprehend their exact meaning. In the first place, the Vetterlein-Barnes case was not like the one at bar. The principle involved while apparently similar, was in fact quite different. Theodore H. Vetterlein, Bernard T. Vetterlein, Theodore J. Vetterlein,
98 and Charles Meurer were doing business under the name and style of Vetterlein & Co. in the city of Philadelphia. One J. Kinsey Taylor became indebted to the firm in a large sum, and to secure it he caused his life to be insured, and assigned the policies to Theodore H. Vetterlein, who was a member of the firm. In July of 1868 Meurer retired from the firm, at which time Taylor's indebtedness amounted to about $50,000.00. In December of the same year Theodore J. Vetterlein retired from the firm also. The two remaining partners continued the business. In July of 1870 these policies were assigned by Theodore H. Vetterlein to Bernard T. Vetterlein and Theodore J. Vetterlein as trustees of the wife and children of the assignor. In February of 1871 Theodore H. and Bernard T. Vetterlein were adjudged bankrupts on a petition filed December 28, 1870. Taylor died July 1, 1871. Proof of death was made by the trustees, and they were proceeding to collect the insurance due on the policies when suit was brought by Barnes, the assignee in bankruptcy, against the assignees who held the legal title to the policies, to enjoin them from collecting the same, claiming that the policies were assigned by Theodore H. Vetterlein in fraud of the creditors of the firm, as Taylor's indebtedness to the firm at the time of the assignment of the policies for the benefit of the assignor's wife and children had not been paid, and was in excess of the face of the policies. The question arose as to whether or not the *cestuis que trust* were necessary parties to the suit, and the court held that they were not. The question in that case was one of fraud against the creditors of the grantor, and the

creditors' rights to the assets of the insolvent firm existed prior to the creation of the trust, and the trustee had full authority by implication, if not by express language, to represent the *cestuis que trust* in everything connected with the collection of the policies, and they would be bound by their
90 acts; and that is one of the distinctions made in that case, for the court quoted from Kerrison *v.* Stewart, 93 U. S. 155, as follows: "But, in a suit brought against a trustee by a stranger for the purpose of defeating the trust altogether, the beneficiaries are not necessary parties if the trustee has such powers or is under such obligations with respect to the execution of the trust that those for whom he holds will be bound by what is done against him as well as by what is done by him. In such cases of representation by trustees the beneficiaries will be bound by the judgment unless it is impeached for fraud or collusion between him (the trustee) and the adverse party." And again, in the same opinion, after stating the general rule: "But the rule is different where the claim of the plaintiff antedates the creation of the trust, and the suit is brought, not in recognition or furtherance of the trust, but in hostility to it, as fraudulent and void." Finally the court quotes from the case of Rogers *v.* Rogers, 3 Paige, 379: "But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee who is the holder of the legal estate in the property, without joining the *cestuis que trust*;" citing authorities.

It will be seen from an examination of the Vatterlein-Barnes case that the only question decided therein is that when one who is involved and insolvent conveys away a part of his property to a trustee for the benefit of a third party, for the purpose of defrauding his just creditors, the person named in the deed as the *cestui que trust* need not be made a party to the action; and there are many good reasons why this should be so. The theory of the courts that *that* have made this exception to the general rule is that the conveyance of the legal title under such circumstances is a fraud
100 upon the creditors of the grantor, and is therefore void as against them; and, as they are equitably entitled to the property conveyed, they only have to reach the legal title and devest the trustee of it. In fact, many of the courts hold that it is not necessary to cancel a deed executed in fraud of creditors by a suit in equity, but that the creditors may ignore the conveyance, and attach the property as the property of the grantor. But, to justify the failure to make the *cestui que trust* a party to suit, the plaintiff must plead and prove such a state of facts as will clearly show that the *cestui que trust*, has no equitable interest in the property as against the plaintiff, or it must appear from the language of the deed or by implication that the trustee has full power to bind the *cestui que trust* in all matters connected with the suit. In other words, his powers as trustee must be such that a judgment between him and the plaintiff would be *res judicata* between the plaintiff and the *cestui que trust;* and, before the trustee could defend the

equitable title of the beneficiary of the deed, his power should be such as to make him the agent of such beneficiary, for under our statutes every action must be prosecuted or defended by the real party in interest. Usually a trustee is not granted such powers. He can defend only such title as he holds, which usually is a naked legal title. Therefore, when the legal title is attacked in such a way as to threaten the safety of the equitable title of the *cestui que trust*, the law makes it the duty of the trustee to notify the beneficiary of the deed, so that he may come in and prove his equities and sustain the deed; for, although the equities of the plaintiff may be superior to the legal title of the trustee, if the equitable title of the *cestui que trust* is greater than that of the plaintiff, the deed should be upheld, and its conditions performed. The supreme test is, has the *cestui que trust* an interest in the property? If so, that interest must be afforded representation, and, if this is denied, the court cannot in equity devest the absent
101 party of such estate or adjudge it not to exist; and the court cannot say that the *cestui que trust* has no equities, without hearing him, except in cases where the legal title has been conveyed to his trustee in fraud of some prior existing right, and under such circumstances that his equities, no matter how strong between him and the grantor, could not defeat the plaintiff's claim. And, as stated before, this exception is made because the *cestui que trust* can acquire no equities under a conveyance that is void by reason of having been executed in fraud of the grantor's creditors. If this is not to be the rule, then one can be deprived of property without due process of law; for surely it will not be contended that an equitable interest of a beneficiary under a trust deed is not property, as contemplated by the Constitution. And these views are not unsupported by able authorities. Perry on Trusts, vol. 2, § 83: "If a *cestui que trust* is absent, and all the means of compelling him to appear have been exhausted, the suit may proceed in his absence; so, if he is a merely passive party, and the disposition of the property is within the power of those before the court. But if the primary object of the bill is to deprive the *cestui que trust*, or to charge it with debts or liens, the court will not make a decree in his absence, although the legal title is in the parties before the court. In such cases decrees have been made reserving the right of the *cestui que trust* to apply to have it amended, or conveyances have been ordered without prejudice to the rights of the *cestui que trust*, who could not be found." Story, Eq. Pl. (9th ed.) lays down the rule in the following sections of his work: "Sec. 149. So persons having demands prior to the creation of a trust may enforce those demands against the trustees without bringing before the court the person interested
102 under the trust, if the absolute disposition of the property is vested in the trustee. But if the trustees have no such power of disposition, (as in the case of trustees to convey to certain uses,) the persons claiming the benefit of the trust must be made parties. In many other cases persons having specific charges on trust property are also necessary parties. Thus, for example, if an indenture of assignment should be made by a debtor, conveying all

of his property to such of his creditors as should execute the indenture within three months, and 20 only of his creditors should within the period execute the indenture, and a suit should be brought by a judgment creditor to recover satisfaction out of the trust property, upon the ground of the priority of his judgment, all the creditors who had signed the instrument, their names being known, ought to be made parties, and an allegation in the bill of their being numerous would not be sufficient." § Sec. 207. Seventhly, in cases of trust. The general rule in cases of this sort is that in suits respecting the trust property, brought either by or against the trustees, the *cestui que trust* (or beneficiaries,) as well as the trustees, are necessary parties. And, where the suit is by or against the *cestuis que trust* (or beneficiaries,) the trustees, also, are necessary parties. The trustees have the legal interest, and therefore they are necessary parties. The *cestui que trust* (or beneficiaries) have the equitable and ultimate interest to be affected by the decree, and therefore they are necessary parties. Indeed, in England the general rule is that, if property is given to trustees for certain *cestuis que trust* (or beneficiaries,) a court of equity will decree it to be paid to the latter, and not to the trustees, so that the beneficiaries are emphatically the direct parties in interest. For a similar reason all persons who have specific charges on trust property, derived
103 under the trust, and appertaining to the due execution of it, are generally required to be made parties to suits respecting the due execution of the trust, or touching their rights therein, whenever the persons are definitely ascertained, and the trust is of a limited nature. "Sec. 208. Upon the general principle of courts of equity, there would be an impropriety in binding either the legal claimants or the equitable claimants unless they were fully represented, and permitted to assert their rights before the court; and, if not bound, the decree would not be final on the matter litigated. If the *cestuis que trust* (or beneficiaries) should not be made parties to the suit, and their interests are apparent, a court of equity will sometimes, as a matter of indulgence, and to prevent further delay and expense, allow them (if they wish) to bring forward their claims by petition, in order to have their interests ascertained and their rights protected. But at all events they may bring a bill against their trustees and the original plaintiff to assert and protect their rights in the other suit." And again, in section 215: "It has been stated that, where the trustee has the absolute power of disposing of property, he is the only necessary party. But, if the trustees have not such absolute power of disposition (as if they are trustees merely to convey to certain uses) then the persons entitled to the benefit of the trust must *must* also be made parties. * * * And, where the purpose of the bill is to declare trusts for the benefit of those not named as beneficiaries in the writing, the latter must be joined."

There is one further fact to be considered in this connection: The Secretary of the Interior deeded the land in controversy to the trustees for the purposes and uses named in the patent. They had

no authority to deed to the plaintiff on demand, even though
104 his rights were superior to those of the townsite settlers. Their powers were not general, but special, and they cannot legally do any act which is not either implied or authorized by the deed, taking into consideration the purpose of the trust; and as they have no general power to dispose of the property as they may see fit, but must dispose of it only in one designated way, and for certain particular uses, the beneficiaries should be made parties in all actions where the trust relations between the trustees and the townsite settlers may be destroyed, and the property appropriated to a use not contemplated by the deed. In Smith *v.* Gaines, 39 N. J. Eq. 545, it is said: "The general rule as to parties in cases of trust is that in suits respecting the trust property, brought either by or against the trustees, the *cestuis que trust* are necessary parties. Many exceptions have been made to this rule, some for convenience, some for the reasons that, by the terms or the nature of the suit, the trustees themselves represent the *cestuis que trust*. On this latter ground it has been laid down that, where the only object of the suit is to transfer the trust property into the hands of the trustees, the *cestuis que trust* need not be parties, but, if the existence or enjoyment of it is affected by the prayer of the suit, then they should be. Even to the rule in this restricted form there are numerous exceptions. * * * Courts of equity exercise a large discretion in the matter, guided sometimes by slight circumstances, and taking care, on the one hand, that justice shall not be defeated through the impracticability of bringing in all persons interested in the issue, and, on the other hand, that the rights of individuals shall not be determined when they are neither heard nor represented." And in the English chancery courts the rule is that if the bill has for its object the sale of real estate vested in trustees by devise, and they have not a present absolute
power of disposition over it, according to the terms of the
105 trust, they do not fully represent the *cestuis que trust*, and the latter must be made parties. To the same effect is Bigelow, Estop. (3d ed.) p. 88. From these authorities, and reason, we think it is clear that the occupants of the town lots who were the beneficiaries in the trustees' deed were necessary parties, and should have been brought before the court and given an opportunity to present their case. It is not claimed that any of the Government officers were guilty of any fraud in the execution of the trustees' deed, and therefore the exception stated in the Vetterlein-Barnes case has no application. But while the townsite claimants should have been made parties, if it were made to appear to the court that, on account of a large number of persons claiming as *cestuis que trust*, they could not, without great inconvenience and great cost, all be named and served with process, the court should permit a reasonable number of the beneficiaries to defend for all. Perry, on Trusts, vol. 2, § 885. "Where the parties in interest are so numerous that it is not possible or convenient to join all as plaintiffs, the court will allow a few *cestuis que trust* to sue in behalf of themselves and others. So a small number may be made defendants as representatives of all the others, for the purpose of determining their rights, but in such cases all the

trustees must be joined. If all the *cestuis que trust* must join in a conveyance, they should all join in the suit, otherwise the litigation might be futile; but, in the absence of any, the court will proceed to bind the rights of all, if possible. In order that a few may sue or be sued in behalf of a large number, it must appear that all have the same beneficial interest; for, if they have different or conflicting interests, they must all be brought before the court, in order that their separate interests may be adjusted. How large the number must be, in order to dispense with calling them all before the court, has never been determined." While the claim of each of the townsite occupants is for a different lot or different lots, still they all
106 have the same beneficial interest in sustaining the title of the trustees, and therefore a few could defend for all without violating any of the rules enunciated herein.

3. We will now consider the relation of the trustees to the General Government and the townsite settlers, and, also in this connection, as to whether or not an action can be maintained by the plaintiff to divest the trustees of the legal title before they transmit it to the lot claimants. Mr. Chief Justice Fuller, in McDaid *v.* Oklahoma, *ex rel* Smith 150 U. S. 218, said: "In the light of these provisions, we perceive no reason for doubting that the trustees appointed by the Secretary under the act, and whose compensation and expenses were fixed by him, were agents of the Government for the purpose of carrying out the trust thereby created, to the extent and as specified; and this includes the ascertainment of the beneficiaries in the first instance, and the transfer of the title to them. While on the final entry the title of the United States was to be conveyed to the trustees, such conveyance was explicitly declared as made for the uses and purposes in the act provided; and among these uses and purposes was the determination of controversies between contesting claimants by the trustees, who were to administer oaths, pass on evidence, and keep a record of their proceedings, to be deposited in the Land Department. They unquestionably, in that regard acted as the representatives of the Government. * * * As matter of convenience, the trustees were the instrumentality for the transmission of title in respect of lands disposed of to actual holders, while the Secretary, notwithstanding the patent, was the medium as to surplus lands, which he could not be if the legal title had definitely passed to the trustees by the patent for the whole site. * * * The trust upon which the title was held was to be discharged in accordance with the regulations, and was necessarily subject to the supervisory power, of the Department of the Interior." * * * And that "the Government retains its connection by having the entry made
107 by its own agents and the trust executed in the manner it directs. By the scheme of this act the title is held in trust for the occupying claimants, it is true, but also in trust, *sub modo*, for the Government until the rightful claimants and the undisposed surplus lands are ascertained. The act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon

these Government appointees, and, until the trustees conveyed the title, did not pass beyond the control of the executive department in that regard."

By this opinion the highest court of the land has settled that these trustees are simply Government agents, that they hold the legal title only for the uses and purposes named in the act of Congress under which the agency was authorized, and that until conveyance is made by the trustees the land included in the patent is subject to the supervision of the executive branch of the Government. If this is true, then, as stated in the opinion, the absolute title has not passed from the Government, and one cannot maintain an action in equity to declare a resulting trust in relation to public land until the Interior Department has by absolute conveyance of the legal title lost all control over it; nor can the courts compel by mandamus the conveyance of the legal title by the Government's agents, or declare the Government or its agents to be trustees for another. Astiazaran *v.* Santa Rita Land and Mining Co., 148 U. S. 80; Johnson *v.* Towsley, 13 Wall. 72; Smelting Co. *v.* Kemp, 104 U. S. 636; Steel *v.* Smelting Co., 106 U. S. 447; New Orleans *v.* Paine, 147 U. S. 261; U. S. *v.* Schurz, 102 U. S. 378; U. S. *v.* Black, 128 U. S. 149.

Congress has the absolute power to dispose of the public lands in any manner it may deem best, and its action is final. If it wishes the title to remain in the name of the United
108 States, it may so provide, or if it should elect to place the title in the Secretary of the Interior or in any other officer, to be held by him for the uses named in the acts of Congress, it has the undoubted power, and the Secretary would only be the agent or representative of the Government, and could not appropriate the land to any use other than those named by Congress. Therefore the question to be determined is, what was the intent of Congress when it provided for the issuance of the title to the townsite trustees? Counsel for plaintiff contend that the absolute title passed to the trustees when the patent was issued and recorded, under the theory that the Government parts with the title by record. This, of course, is the general rule; but counsel have failed to distinguish between a conveyance from the Government to one whose title would be adverse to it, and a conveyance to its own agent for a particular purpose or use named in the act of Congress authorizing the issuance of such deed or patent. It will certainly not be contended that Congress had not the power to provide that the patent should issue for these lands to the townsite trustees, and that they should not be liable to suit by any one claiming an interest in the land, except where an action would lie if the title had not been conveyed by patent to the trustees, but had remained in the United States. Now, if Congress could do this by an express provision, and the language of the act authorizing the conveyance is such as to clearly show that such was the intent of that body, the courts are bound to declare the law to be that which Congress intended it should be. From an examination of this act, we think that Congress gave the title to the trustees for the uses and purposes named in the act, and for no other; and the trustees

had authority to act only within the scope of the power
109 granted. They had power to hear and determine the rights of different claimants to lots, subject to review by the Commissioner of the General Land Office and the Secretary of the Interior; and where there was no adverse claimant for a lot, or no appeal from their decision in case of contest, they could issue a deed to the proper party without further delay, for this was within their power, but they could not convey to one who was not a town-lot claimant. Congress caused the patent to be issued to them for the use of the occupants of the town, and they were given this title and authorized to convey, probably, as a matter of convenience and to avoid delay; but, no matter what the reason for adopting this system, Congress, in effect, gave the title to its agents, the trustees, and said to them: You take this title, and give it to the persons who are occupying the respective lots in the town; but, if there are any lots not occupied by any person, you retain the title, and the Secretary will appropriate them to certain uses, and direct you to convey, or dedicate in accordance therewith. Congress having directed the title to be conveyed to the occupants of the town through its agents, no one can intercept that title until it is vested in the person or persons whom Congress intended, any more than he could prevent a conveyance by the United States to such persons direct. So far as third persons, or persons whom the trustees or their superior officers decide are not entitled to deeds, are concerned, the title is protected by the same rules as though the patent had never issued to the trustees. It is evident that Congress so intended. If this is not the rule, and one claiming adversely to the trust can maintain an action like the one at bar against the trustees, what is to prevent every defeated contestant for a townsite lot, as soon as his case is finally determined by the Secretary of the Interior, and before deed is issued to his opponent, from bringing a similar action against the trustees and the person to whom the lot has been awarded?
110 Such defeated claimant would have the same right to maintain such action as the plaintiff in this case has to maintain the present action. Surely Congress never meant to place its agents or officers, on whom was imposed the duty of carrying the title from the Government to the occupants of the town, in a position where they could be subjected to such annoyance and inconvenience. We have already held, by a unanimous court, in the case of Topeka Commercial Security Co. *v.* McPherson, *et al.*, 7 Okl. 332, that these lots are not subject to taxation until deeded by the townsite trustees; and this decision was based upon the theory that the absolute title had not passed from the Government, but that the lots were still under the supervisory power of the Secretary of the Interior, and the court said that a sale of such lots, prior to deeding, for failure to pay taxes, was an interference with the primary disposal of the soil, and a law authorizing such taxation would be void. Taking into consideration the objects and purposes of the conveyance by patent to the trustees, we conclude that they cannot be embarrassed and indefinitely delayed in carrying out the purposes of the trust by end-

less litigation, and compelled to expend their own money in defending the legal title to the townsite; and this they would have to do, if they can be sued, as there is no law by which they can be reimbursed by the Government.

Counsel for the plaintiff raise the point that under the organic act only 320 acres could be taken in one locality for townsite purposes, as no townsite entry could contain more than that amount of land. Though this were true (which we do not decide), it cannot make any difference in this case; for the plaintiff cannot, even if the townsite entry was wrongfully made, and the plaintiff's equities ever so great, frame a petition that will state a cause of action against the trustees to declare a resulting trust. He must
111 wait, although it may work a great hardship upon him, until after the Government has parted with the absolute title, and exhausted its supervisory power over the land embraced in the townsite entry. In our opinion, Congress has, in effect, so provided, and its will is supreme. The petition did not state a cause of action. For the reasons herein stated, the judgment of the trial court is hereby affirmed, at the costs of the appellant. All of the justices concurring, except Hainer J., who was of counsel below, not sitting, and McAtee, J., not present.

112 And afterward, to wit, at the June, 1901, term of said supreme court, on September 4, 1901, the following further proceeding was had in said cause, to wit:

HENRY H. BOCKFINGER, Plaintiff in Error,
vs.
JOHN W. FOSTER ET AL., Defendants in Error. } # 367.

Comes now James R. Keaton, of counsel for plaintiff in error, and asks an order, and files his petition for an order of appeal to the Supreme Court of the United States, together with his assignment of errors in said cause and affidavits of the amount in controversy, which said petition, assignment of errors, and affidavits read in words and figures as follows, to wit:

113 In the Supreme Court of the Territory of Oklahoma.

HENRY H. BOCKFINGER, Plaintiff in Error,
vs.
JOHN W. FOSTER, W. S. ROBERTSON, and A. C. SCHNELL, Trustees of Townsite Board No. 6, Oklahoma Territory, Defendants in Error.

Petition for Order Allowing Appeal from Final Judgment and Decree Heretofore Entered by the Supreme Court of Oklahoma in this Case to the Supreme Court of the United States.

Comes now plaintiff in error, Henry H. Bockfinger, and conceiving himself aggrieved by the judgment and decree made, entered and filed by this court in the above-entitled cause on the 5th day of

September, 1900; whereby, among other things, it was ordered, adjudged and decreed that the judgment of the district court of Logan county, sustaining the demurrer of defendants below to plaintiff's complaint and dismissing said action at plaintiff's cost, be affirmed for the reasons specified in the opinion handed down on said date and that said defendants in error recover of this plaintiff in error the costs of this court amounting to $—; does hereby appeal from the said judgment and decree of this court so entered and filed on the said 5th day of September, 1900, to the Supreme Court of the United States, for the reasons and upon the grounds specified in the assignment of errors filed herewith and made a part hereof, and he prays that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States, as provided by law and the rules of said court, and that an order be made by this court fixing the amount of the appeal bond to be given by plaintiff in error.

JAMES R. KEATON,
COTTERAL & HORNOR,
Attorneys for Henry H. Bockfinger, Plaintiff in Error.

Filed Sept. 4, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court.

Endorsed: 367. Bockfinger *vs.* J. W. Foster, *et al.* Petition for order allowing appeal. Filed Sept. 4, 1901. Benj. F. Hegler, clerk supreme court.

114 In the Supreme Court of the Territory of Oklahoma.

HENRY H. BOCKFINGER, Plaintiff in Error, *vs.* JOHN W. FOSTER, W. S. ROBERTSON, and A. C. Schnell, Trustees of Townsite Board No. 6, Oklahoma Territory, Defendants in Error.	Assignment of Errors on Appeal.

Comes now plaintiff in error, Henry H. Bockfinger, and in connection with his appeal and as a part thereof, makes and files the following assignment of errors upon which he will rely:

1. The supreme court of the Territory of Oklahoma erred in holding and deciding that: "In an action against townsite trustees appointed by the Secretary of the Interior under the act of Congress of May 14, 1890 (26 Stat.: 109, c. 207), and to whom patent has issued, to declare a resulting trust in favor of a plaintiff who claims adversely to the townsite entry, even if such action would lie, the townsite-lot claimants are necessary parties to the action."

2. The said supreme court erred in holding and deciding that: "The conveyance of a townsite to such trustees is for a particular use named by Congress, and the courts cannot intercept the legal title

in the hands of the Goverment's agents. Adverse claimants for such townsite must wait until title has lodged in the persons, or is put to the uses directed by Congress. Therefore such townsite trustees cannot be adjudged by a court of equity to be trustees for the use and benefit of one claiming adversely to the trust created by the act of Congress under which patent was issued to them, and a petition which discloses on its face that the trustees have not conveyed the title by deed, but still retain the same, fails to state a cause of action for a resulting trust."

3. Said court erred in deciding that the petition of plaintiff in error did not state a cause of action, and, thereby, affirming the judgment of the trial court.

4. Said court erred in not deciding said cause upon its merits and in not rendering judgment therein, in favor of plaintiff in error, reversing the judgment of the trial court and directing it to
115 enter a judgment for said plaintiff in error (plaintiff below).

Wherefore the said plaintiff in error prays that the said judgment of the supreme court of the Territory of Oklahoma be reversed, and said cause remanded with directions to said court to enter a decree reversing the judgment of the district court of Logan county and directing said district court to enter judgment for plaintiff in error as prayed for in his complaint.

JAMES R. KEATON,
COTTERAL & HORNOR,
Attorneys for Plaintiff in Error.

Endorsed on back as follows, to wit: 367—Bockfinger *vs.* John W. Foster, *et al.*—Assignment of errors on appeal—Filed Sept. 4, 1901. Benj. F. Hegler, clerk supreme court.

116 In the Supreme Court of the Territory of Oklahoma.

HENRY H. BOCKFINGER, Plaintiff in Error, *vs.* JOHN W. FOSTER, W. S. ROBERTSON, and A. C. Schnell, Trustees Townsite Board No. 6, Oklahoma Territory, Defendants in Error.	Affidavit Showing Amount in Controversy.

Henry H. Bockfinger of lawful age, being first duly sworn according to law, on his oath says: That he is the plaintiff in error (plaintiff in the trial court) in the above-entitled action; that he is familiar with the controversy involved in this case and knows the amount at issue and involved therein and of controversy therein, and knows the amount in controversy in said cause, exclusive of cost, to exceed the sum of five thousand ($5,000.00) dollars, and to be about the sum of $20,000.00, that being the reasonable value of the land, title to which is involved and of controversy in said cause.

HENRY H. BOCKFINGER.

Subscribed and sworn to before me this 4th day of September, 1901.

BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed on back as follows, to wit: 367—Bockfinger *vs.* John W. Foster *et al.*—Affidavit showing amount in controversy—Filed Sept. 4, 1901. Benj. F. Hegler, clerk supreme court.

117 And on the same day, to wit: September 4, 1901, said court granted an order allowing said appeal, and fixing a bond therein, which order reads in words and figures as follows, to wit:

118 In the Supreme Court of the Territory of Oklahoma.

HENRY H. BOCKFINGER, Plaintiff in Error, *vs.* JOHN W. FOSTER, W. S. ROBERTSON, and A. C. Schnell, Trustees Townsite Board No. 6, Oklahoma Territory, Defendants in Error.	Order Allowing Appeal.

Upon motion of James R. Keaton and Cotteral & Hornor, counsel for plaintiff in error and on filing the petition of Henry H. Bockfinger, said plaintiff in error, for an order allowing appeal, together with the assignment of errors and the affidavit of said Henry H. Bockfinger showing that the amount involved in said cause exceeds the sum of five thousand ($5,000.00) dollars; it is hereby ordered by this court that an appeal be allowed to the Supreme Court of the United States from the final judgment and decree rendered by this court and filed in the office of the clerk thereof on the 5th day of September, 1900; that the amount of the bond upon said appeal be, and the same hereby is, fixed at the sum of $500.00 and that a certified transcript of the record and proceedings be forthwith transmitted to the said Supreme Court of the United States.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:

BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed on back as follows, to wit: 367—Bockfinger *vs.* John W. Foster *et al.* Order allowing appeal. Filed Sept. 4, 1901. Benj. F. Hegler, clerk supreme court.

119 And that afterward, to wit: on September 5, 1901, an order was made in said cause as follows, to wit:

HENRY H. BOCKFINGER, Plaintiff in Error,
vs.
JOHN W. FOSTER ET AL., Defendants in Error. } # 367.

Ordered by the court that the bond heretofore to wit: September 4, 1901, fixed in this cause in the sum of $1000 be reduced to the sum of $500.

And now said bond is filed, and reads in words and figures as follows, to wit:

120 In the Supreme Court of the Territory of Oklahoma.

HENRY H. BOCKFINGER, Plaintiff in Error,
vs.
JOHN W. FOSTER, W. S. ROBERTSON, and A. C. Schnell, Trustees Townsite Board No. 6, Oklahoma Territory, Defendants in Error. } Bond on Appeal.

Know all men by these presents: That we, Henry H. Bockfinger as principal and —— —— as sureties are each jointly and severally held and firmly bound unto the above-named J. W. Foster, W. S. Robertson and A. C. Schnell in the sum of $500.00 lawful money of the United States of America, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

The condition of the above obligations is such that whereas said Henry H. Bockfinger has taken an appeal to the Supreme Court of the United States to reverse the final judgment and decree rendered and entered by this court in the above-entitled action on the 5th day of September, 1900,

Now, therefore, if the above-named Henry H. Bockfinger, plaintiff in error herein, shall prosecute said appeal to effect and shall answer all costs that may be awarded against him, if he fails to make his plea good then this obligation shall be void, otherwise to remain in full force and effect.

Witness our hand- this 5th day of September, 1901.

HENRY H. BOCKFINGER.
PHILIP BOCKFINGER.
KONRAD ZIRKEL.
EMIL RITTERBUSCH.
L. J. HIRZEL.

121 TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

Comes now Conrad Zirkle, who being first duly sworn, says he is surety on the above and foregoing obligation, and that he is worth the sum of $1000.00 over and above all his debts, liabilities and legal exemptions.

KONRAD ZIRKEL.

Subscribed and sworn to before me this 5th day of September, 1901.

H. D. TODD,
Notary Public.

[SEAL.]

My commission expires Nov. 10, 1903.

The foregoing bond is hereby approved by me this fifth day of September, 1901.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Endorsed on back as follows, to wit: 367—H. H. Bockfinger, plaintiff in error, *vs.* Jno. W. Foster, *et al.*, defendants in error.—Bond on appeal. Filed Sept. 5, 1901. Benj. F. Hegler, clerk supreme court.

122 And afterward to wit: September 21, 1901, the following further proceeding was had in this cause to wit:

123 In the Supreme Court of the Territory of Oklahoma.

HENRY H. BOCKFINGER, Plaintiff in Error,
vs.
JOHN W. FOSTER, W. S. ROBERTSON, and A. C. SCHNELL, Defendants in Error.

Comes now the plaintiff in error above named, and moves the court to pass an order directing the clerk thereof, in making up the transcript of the record on appeal to the Supreme Court of the United States in this cause, to certify the original of that portion of the complaint designated and attached thereto as "Exhibit A," the same being or purporting to be, a copy of all the testimony taken before the United States land office in the trial of certain contests involving the west half (½) of said section eight (8), township 16 N., of range 2 west, and now known as West Guthrie, for the reason that said exhibit is very voluminous, and only a small portion of the matter contained therein, if any, is necessary to be considered by said Supreme Court of the United States in determining the issues to be presented to said court on said appeal.

JAMES R. KEATON,
COTTERAL & HORNOR,
Attorneys for Plaintiff in Error.

I, the undersigned, attorney of record for the above-named defendants in error, do hereby consent that the above application of plaintiff in error to have the original of Exhibit A of his said complaint certified to the Supreme Court of the United States as a part of the transcript of record in said cause, be granted, and that said order be made.

HORACE SPEED,
Attorney for Defendants in Error.

124 In the Supreme Court of the Territory of Oklahoma.

HENRY H. BOCKFINGER, Plaintiff in Error,
vs.
JOHN W. FOSTER, W. S. ROBERTSON, and A. C. SCHNELL, Defendants in Error.

Now on this 21st day of September, 1901, upon the application of plaintiff in error above named and the consent that said application be granted by counsel for defendants in error, it is hereby ordered that the clerk of this court certify to the Supreme Court of the United States as a part of the transcript of record in said cause, the original of Exhibit A, attached to and made a part of the complaint of said plaintiff in error.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Endorsed on back as follows, to wit: #367.—Henry H. Bockfinger, *vs.* John W. Foster, *et al.*—Application by plaintiff in error for portions of original record to be sent up as part of transcript.—Agreement thereto by defendant in error—and order granting same.—Filed Sept. 21, 1901. Benj. F. Hegler, clerk supreme court.—James R. Keaton and Cotteral & Hornor, att'ys for plaintiff in error.

125 UNITED STATES OF AMERICA, *Territory of Oklahoma,* } *ss:*

In the Supreme Court.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing pages, numbered from 1 to 124 inclusive, are a full, true and complete transcript of the record and all proceedings in said supreme court in the cause of Henry H. Bockfinger, plaintiff in error, *vs.* John W. Foster, W. S. Robertson, and A. C. Schnell, trustees Townsite Board No. 6, Oklahoma Territory, defendants in error, as the same remain of record and on file in said supreme court, excepting the bound copy of Exhibit "A," which, being very voluminous, for convenience in binding, follows the certificate—its regular order being next after page 84 hereof.

In witness whereof, I hereto set my hand and affix the seal of said supreme court, at Guthrie, this 28th day of September, 1901.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk Supreme Court.

Endorsed on cover: File No. 18,289. Oklahoma Territory supreme court. Term No. 175 Henry H. Bockfinger, appellant, *vs.* John W. Foster, W. S. Robertson, and A. C. Schnell, trustees of Townsite Board No. 6, Oklahoma Territory. Filed October 18", 1901.

10—175

FILE COPY.

Office Supreme Court U. S.
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FEB 12 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court

of the

UNITED STATES.

October Term, 1902.

Henry H. Beckfinger,
Appellant,

vs.

John W. Foster, W. S. Robertson and A. C. Schnell, Trustees of Townsite Board No. 6, Oklahoma Territory.

No. 175.

BRIEF FOR APPELLANT.

JAMES R. KEATON,
JOHN W. SHARTEL,
FRANK WELLS,
JOHN H. COTTERAL,
C. G. HORNOR,
FOR APPELLANT.

20235

Supreme Court

of the

UNITED STATES.

October Term, 1902.

Henry N. Bockfinger,
Appellant,

vs.

John W. Foster, W. S. Robertson and A. C. Schnell, Trustees of Townsite Board No. 6, Oklahoma Territory.

No. 175.

BRIEF FOR APPELLANT.

Statement of Case.

The complaint of appellant, including exhibits "B," "C," "D," "E," and "F" attached thereto, shows the following:

That Mark S. Cohn made Homestead Entry No. One (1) at the Guthrie, O. T., land office for the Northwest Quarter of Section Eight (8) in Township Sixteen (16) North of Range Two (2) West of the Indian Meridian at 12 o'clock noon of April 22nd, 1889; (Printed Record, page 17). That on April 23rd, 1889 James W. Feagins made Homestead Entry No. Seventeen (17) for the Southwest Quarter of same Section, he having made settlement thereon at thirty-five

minutes after 12 o'clock noon the preceding day; (R. pp. 4, 19). That affidavits of contest were filed against Cohn's entry by Thomas J. Taylor, John Eaton, Edmond Slayter and others, alleging, among other things, that said entryman had entered the Territory of Oklahoma before 12 o'clock, noon, of April 22nd, 1889 and was, therefore, disqualified to make homestead entry of any land then open to settlement in said Territory; (R. p. 18). That similar affidavits of contest were filed against the said entry of James W. Feagins by J. M. Patterson, Ezra Maples, Henry H. Bockfinger and others, but, as Patterson subsequently dismissed his contest and all other contestants, except Maples and Bockfinger, made default at the hearing, it is not necessary to refer to them further; (R. pp. 19, 20). That the contest of Ezra Maples was filed on the 3rd day of May, 1889, and on May 16th he made a homestead application for the said Southwest Quarter of said Section 8, Township 16 North, Range 2 West, I. M., which said application was rejected for conflict with the entry of record, from which rejection he took no appeal; (R. p. 25). That the contest of Henry H. Bockfinger (appellant herein) was filed May 24th, 1889, alleging the disqualification of said Feagins, Patterson and Maples to make homestead entry of lands in said Oklahoma Territory; (R. pp. 5, 20, 25). That on June 19th, 1889, an application was filed by James Dooley to enter the west half of said Section 8 as a townsite for the use and benefit of the occupants of the claimed townsite of West Guthrie; (R. pp. 5, 17). That on April 20th, 1900 said Bockfinger made settlement thereon and has ever since resided upon, cultivated and improved said tract.

That no action was taken by the Register and Receiver of the local land office looking to the ordering of hearings on the affidavits of contest against the said entries of Cohn and Feagins, and the townsite application having been transmitted to the General Land Office, the Commissioner, by letter "G," of October 23rd, 1889 ordered a hearing on said townsite appli-

cation to be conducted in accordance with his previous general instructions of August 8th, 1889 in townsite matters wherein the local officers were directed to ascertain when the land included within such application was first actually selected and occupied for townsite purposes, the number of inhabitants thereon, the character and location of all municipal improvements, both at the date of filing such application and at the time of hearing. In addition to these general instructions contained in the Commissioner's said letter of August 8th, 1889, which was referred to for their guidance, the Register and Receiver of said Guthrie Land Office were further specifically instructed as follows:

"The object of this hearing is certainly to determine the right of the townsite claimants, and I hereby direct that the only question you should inquire into in addition to those mentioned in my former letter is the qualifications of the homesteaders as such at the date of making their entries." (R. pp. 5, 26).

Under these instructions the rights of the applicants to contest the homestead entries, were not fully considered; in fact, were not inquired into, except as to the dates of filing their contests and of their respective settlements on the land, and the hearing was mainly confined to the inquiries as to the qualifications of Cohn and Feagins, who had respectively entered the Northwest and Southwest quarters of said Section 8, under the homestead law, and to the claims of the townsite applicants. (R. pp. 5, 26, 29.)

As a result of this hearing the local officers found that Cohn and Feagins were "sooners" and, therefore, disqualified, from procuring title to said quarters, and acquired no rights by their said homestead entries. That townsite settlers to the number of 150 to 200 crossed the Cottonwood Creek which they supposed to be the west line of the east half of section 8, about 4 o'clock in the afternoon of the 22nd of April, at a point on the northeast forty of the southwest quarter, and staked off lots on a small portion of said forty, also upon the northwest quarter and that portion of the

northeast quarter of said section 8, lying west of the Cottonwood Creek. That said persons then and for several days thereafter, believed that the Cottonwood Creek formed the west boundary of the east half of said section and that all west of it was on the west half of the section. They also found that, on the evening of April 22nd, 1889, said parties held a mass meeting and took the initial steps to organize a town to be known as West Guthrie and to be located on what they supposed was the west half of said section 8, and subsequently elected town officers and in the early part of May had the northwest quarter and that part of the northeast quarter lying north and west of said Cottonwood Creek and the small portion of the northeast quarter of the southwest quarter of said section 8, lying north of said creek surveyed into lots, blocks, streets and alleys. That some of the persons who located on the said portion of the northeast quarter of the southwest quarter remained on the lots staked by them, that other persons settled on said porion of said forty, all aggregating 30 or 40 in number, on June 15th, 1889, when they were forcibly removed by the military. That none of the parties so removed ever returned to their said former locations, and no part of the said southwest quarter of said section 8, was ever thereafter occupied by townsite claimants up to the date of the decision of the said Register and Receiver, to-wit, December, 4th, 1900. (R. p. 17.) That the portion of said southwest quarter lying south of said creek, to-wit: the south half and the northwest quarter had not only never been occupied by townsite claimants but had never been surveyed into lots, blocks, streets and alleys. However, they awarded the northwest quarter and the northeast quarter of the southwest quarter to the townsite claimants and recommended a further hearing to determine the rights of the respective homestead claimants to the three remaining 40's of the said southwest quarter. (R. p. 22.)

The Hon. Commissioner of the General Land

Office, in his decision of August 4th, 1891, affirmed the decision of the local officers as to their findings of fact, but modified the decision as to said southwest quarter by awarding the entire quarter to the townsite, upon the theory that, under the law, the settlement of 100 or more inhabitants upon any part of the half section entitled them to select the whole 320 acres as a townsite prior to the date of the passage of the act of May 14th, 1890, which, he concedes, limited such selection to the legal subdivisions actually occupied for purposes of business and trade. (R. pp. 24, 29.) He, therefore, held that, when proof was offered for the purpose of entering said half section as a townsite, the homestead claimants would be permitted to show what legal subdivisions thereof were not occupied for municipal purposes prior to and on said May 14th, 1890, and, upon such showing being made, a further hearing should be had to determine which of the homestead claimants was entitled to make entry of same. (R. p. 30.)

Feagins, Maples and Bockfinger appealed to the Secretary of the Interior, who, on December 16th, 1891, decided unqualifiedly in favor of the townsite as to the entire west half of said section 8. (R. pp. 30 et seq.) Bockfinger alone filed a motion for a review of said departmental decision and a motion supported by affidavits for a rehearing of said cause. These motions were overruled by the Secretary on October 3, 1892. (R. pp. 32-47.) It is further alleged in said complaint that Henry H. Bockfinger (appellant) was and is a native born citizen of the United States, over 21 years of age and, in all other respects, qualified to make homestead entry for the land in controversy. (R. p. 4.) Also "That there was no townsite settlement or occupancy or improvements for townsite purposes upon the southwest quarter of section 8, until after the 16th day of December, 1891," and after the decision of the Hon. Secretary of the Interior of that date had been announced. (R. p. 9.) It is further alleged in said complaint that appellant made application to enter the land

in controversy as a homestead on the ———— day of November, 1892, and before said tract had been entered by appellees as such townsite trustees and while same was public land of the United States, and that he (appellant) applied to make final entry thereof and to make **his final proof therefor, at the same time tending to** the register and receiver of the said Guthrie land office the sum of $1.25 per acre for each acre contained in said tract and the requisite sum to pay the commissions and fees for entering said land as a homestead and making final proof therefor; (R. p. 14.) Also that he made a tender to said trustees, prior of a sufficient amount to fully reimburse them for the sums expended to the commencement of this action, in procuring patent for said tract. (R. p. 15.)

After patent for said half section of land (except 17.9 acres reserved for a public park) had been issued by the President of the United States to John W. Foster, W. S. Robertson and A. C. Schnell, as trustees of townsite board No. 6, for the use and benefit of the occupants of said tract, and before said trustees had conveyed any portion thereof, and on February 25th, 1893, this action was commenced. On the same day a *lis pendens* notice was filed and on April 16, 1893, defendants filed a motion to require plaintiff to separately state and number the several causes of action stated in his complaint, which motion was on same date overruled. On April 25th, following, defendant filed a demurrer to plaintiff's complaint upon the following grounds:

1. That said complaint does not state a cause of action against these trustees.

2. For the reason that the District Court has no jurisdiction of the subject of the action.

3. For the reason that said court has no jurisdiction of said defendants in their capacities as trustees of townsite board No. six, as set out in the complaint.

4. That there is a defect of parties defendant in this, that each and every of the lot claimants upon the land described in the complaint should be made parties

defendant in this action. (R. pp. 49, 50.)

This demurrer was sustained, on October 23, 1894, by the District Court of Logan County, said Territory, whereupon an appeal was duly prosecuted to the Territorial Supreme Court where the judgment of the District Court was affirmed on September 5th, 1900. (R. pp. 53, 57.)

Thereafter and on September 4th, 1901, the said Henry H. Bockfinger procured an order of the Supreme Court of Oklahoma allowing an appeal to this court and he alleged the following assignment of errors on his said appeal, all of which he still asserts and urges, to-wit:

"1. The Supreme Court of the Territory of Oklahoma erred in holding and deciding that: "In an action against townsite trustees appointed by the Secretary of the Interior under the act of Congress of May 14, 1890 (26 Stat., 109, c. 207), and to whom patent has issued, to declare a resulting trust in favor of a plaintiff who claims adversely to the townsite entry, even if such action would lie, the townsite-lot claimants are necessary parties to the action."

2. The said Supreme Court erred in holding and deciding that: "The conveyance of a townsite to such trustees is for a particular use named by Congress, and the courts cannot intercept the legal title in the hands of the Government's agents. Adverse claimants for such townsite must wait until title has lodged in the persons, or is put to the uses directed by Congress. Therefore such townsite trustees cannot be adjudged by a court of equity to be trustees for the use and benefit of one claiming adversely to the trust created by the act of Congress under which patent was issued to them, and a petition which discloses on its face that the trustees have not conveyed the title by deed, but still retain the same, fails to state a cause of action for a resulting trust."

3. Said court erred in deciding that the petition of plaintiff in error did not state a cause of action, and, thereby affirming the judgment of the trial court.

4. Said court erred in not deciding said cause upon its merits and in not rendering judgment therein, in favor of plaintiff in error, reversing the judgment of the trial court and directing it to enter a judgment for said plaintiff in error (plaintiff below)."

Some additional material facts are stated in the argument which follows.

Argument.

I. ON QUESTION OF PARTIES DEFENDANT.

The Supreme Court of the Territory of Oklahoma decided this case on two propositions, holding,

FIRST: That, conceding that the action would lie against the Townsite Trustees, the *cestui que trustents* or some of them are necessary parties defendant.

SECOND; That the action will not lie against the said Townsite Trustees because they are officers or agents of the Government and that, therefore, complete title to the tract of land involved herein had not passed from the Government by the execution of the Patent to them for the use and benefit of the occupants of said tract for townsite purposes.

We shall consider these questions in inverse order, because, if the action will not lie at all against the Townsite Trustees for the reasons assigned, then the court had no such jurisdiction of the subject of this action, at the time it was commenced, as would authorize the rendition of any judgment whatever affecting the title to the land in controversy or, differently stating it, the court lacked the power, under the facts stated in the complaint, to render any other judgment than one dismissing the action; and this, being a jurisdictional question, or one involving the power of the court to render any judgment on the merits of the action, lies at the very threshold of the matters presented for consideration and, consequently, should be

determined before any other question involved in the cause is considered.

This part of the decision of the Oklahoma Supreme Court is based almost entirely upon the principles laid down by this Court in the case of McDaid vs. The Territory, 150 U. S. 209; 37 L. Ed. 1055. Justice Burwell, who wrote the opinion of the court below in this case, after quoting from the McDaid case, draws the following conclusion therefrom:

"By this opinion the highest Court of the land has settled that these trustees are simply Government agents, that they hold the legal title only for the uses and purposes named in the Act of Congress under which the agency was authorized and that until conveyance is made by the Trustees the land included in the patent is subject to the supervision of the executive branch of the Government." (R. p. 65.)

Arguing from this (we think) erroneous premise, the court below proceeds to show quite conclusively that, so long as the title to public land remains in the Government, courts of equity have no power to adjudicate matters affecting such title. The Act of May 14th, 1890, specifically provides that, "when final entry is made, the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided." If, as stated in this Act, "the title of the United States to the land * * * * * shall be conveyed to said trustees," surely the title does not remain in the United States after the conveyance. Clearly then, so far as the rights of the homestead claimants are concerned, the entire title of the Government passed to these trustees by the execution of the patent. The supervisory power vested in the Secretary of the Interior by said Act could, in no wise, affect their interests, which were antagonistic to the purposes of the trust. A grantor may, by a conveyance in trust for the use and benefit of certain other persons, completely devest himself of all title to the land so conveyed and yet this title may not vest in the beneficiaries for many

years thereafter. The distinction claiming we are attempting to make, between the position of a homestead claimant whose rights are anterior and antagonistic to the purposes of the patent issued under said Act and that of a townsite occupant claiming under the patent but adversely to another such occupant, is, we think, clearly recognized in the carefully worded opinion of this court in the McDaid case, wherein, among others, we find the following statements concerning the effect (upon the title) of the patent from the government to these trustees:

"While on the final entry the title of the United States was to be conveyed to the trustees, such conveyance was explicitly declared as made "for the uses and purposes in the Act provided," and among these uses and purposes was the determination of controversies between contesting claimants by the trustees, who were to administer oaths, pass on evidence, and keep a record of their proceedings, to be deposited in the Land Department. They unquestionably acted in that regard as the representatives of the government, and their decisions were properly subject to that appeal to the Commissioner and the Secretary for which the Secretary's regulations provided. By the scheme of this Act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the government until the rightful claimants and the undisposed of or surplus lands are ascertained. The Act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon these government appointees, and, until the trustees conveyed, the title did not pass beyond the control of the executive department in that regard." (150 U. S. 219-220.)

Thus, it is seen that it was only in settling conflicting claims to lots and ascertaining the surplus or undisposed of lands that any control remained in the Land Department and nowhere in said opinion is it

suggested that the government retained any interest in the land or the title thereto after the issuance of the patent to said trustees. The fact that said Act of March 14th, 1890, authorized the Secretary of the Interior to supervise the execution of this trust and, among other things, to provide for a review of the decisions of the trustees on disputed questions arising between contesting lot claimants, can hardly be considered as any evidence whatever that Congress did not intend the complete title of the government should pass to said trustees by the issuance of the patent to them. Instead of authorizing the Secretary of the Interior to provide for such review of said decisions, Congress could have provided for an appeal therefrom directly to the courts of the Territory or to any other designated tribunals and it certainly could not then be contended that, because of the provision for a review of such decisions by the courts or other tribunals, the title to the entire tract had not passed from the United States.

Another reason why we believe it must be held that the patent from the United States to the townsite trustees devested the Government of all title to the land, is, that there is no provision in the patent or in the act under which it was issued for such land, or any portion thereof, to revert to the government, in any event, and, if such patent were procured by fraud or issued by mistake the only way the Government or any one else could avoid same would be by an action in a court of equity. Van Wyck vs. Knevals, 106 U. S., 360; 27 L. Ed. 201; Germania Iron Co. v. United States, 165 U. S., 379.

As to when the title of the United States to public land is devested, see the dissenting opinion of Justice McAtee in Paine v. Foster et al., 9 Okl., 286; 60 Pac., 32; and the case, therein cited, of United States v. Schurz, 102 U. S., 402; 26 L. Ed., 173. See also Wilcox v. Jackson, 13 Pet., 498; 10 L. Ed., 264, wherein it is held that, " where a patent has not been issued for a part of the public lands, the state has not the power

to declare any title, less than a patent, valid against a claim of the United States to the land, or against a title held under a patent granted by the United States;" and, in the body of the opinion, Mr. Justice Barbour, speaking for the court, says, "we think it unnecessary to go into a detailed examination of the various acts of Congress for the purpose of showing what we consider to be true in regard to public lands, that, with the exception of a few cases, nothing but a patent passes a perfect and consummate title. But in this case no patent has issued, and therefore by the laws of the United States the legal title has not passed, but remains in the United States." (pp. 516-517.) That the legal title of the United States to the land in controversy passed to the townsite trustees by the issuance of the patent, cannot be disputed. See Re. Emblen, 161 U. S., 52; 40 L. Ed. 613; wherein it is said that; "After the patent has once been issued the original contest is no longer within the jurisdiction of the land department. The patent conveys the legal title to the patentees, and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor."

The mere fact that this patent was made to trustees of an express trust has no tendency to defeat the passing of complete title as, in order for a patentor to retain any interest in the title or estate conveyed, even though such conveyance is to trustees for certian specific uses, there must be a provision in the patent for the reversion of the estate to him in the event of the failure of the uses or purposes for which the grant was made. Stewart v. Easton, 170 U. S., 384; 42 L. Ed. 1078. See also, Bryan v. Forsyth, 19 How., 334; 15 L. Ed. 674; Meehan v. Forsyth 24 How., 175; 16 L. Ed. 730; Cowell v. Colorado Springs Co., 100 U. S., 55; 25 L. Ed. 547.

In the case last cited the question of when title passes from the United States is also discussed, Mr. Justice Field, who delivered the opinion of the court,

saying, "The other objections urged to the title of the plaintiff are equally untenable. It seems that its title is derived through *mesne* conveyances from one Lamborn, to whom, in September, 1870, a patent of the United States was issued embracing the demanded premises. This patent adds to Lamborn's name the word 'trustee' without mention of any trust upon which he is bound to hold the property. It is, therefore, contended that he must be considered as holding it for some undeclared use of the grantor, and that, consequently, he could not convey it without the consent or direction of the latter, in this case the government. But the answer to this position is given in the patent itself, by the recital that the land was purchased by the patentee of the government, thus negativing the inference that the latter retained any interest in the property or advanced the purchase money." See also Re Emblen, supra, (161 U. S., 52; 40 L. Ed. 613).

The patent covering the land in controversy runs to the trustees, their successors and assigns, without reservation, and payment of the purchase price required by the United States for said land is duly acknowledged, except as to the 17.9 acres reserved for park purposes (see appendix).

The rule is settled that, if the title to the land in controversy passed from the United States by the issuance of the patent, it matters not that said title vested in trustees who were agents of the government, as these agents could be sued by one who had a prior right to and equity in the land the same as if they held the legal title thereto in any other capacity. United States v. Lee, 106 U. S., 196; 27 L. Ed. 171.

The interpretation which we have given said Act of May 14th, 1890 is entirely consistent with the doctrine announced in the McDaid case, and the fact that this court took jurisdiction of the subject matter in the case of Payne v. Robertson et al., 169 U. S., 323, and decided same on its merits subsequent to the decision of the McDaid case is surely conclusive of both ques-

tions upon which this case was decided in the court below, as that case was brought against the same townsite trustees and the identical questions, upon which the case at bar was decided by the Supreme Court of Oklahoma, were raised and urged therein.

We next come to the other ground upon which the Oklahoma Supreme Court based its decision against appellant, to-wit; That the beneficiaries under the patent to said trustees were necessary parties defendant. In this connection, it is well to observe that, at the time this action was commenced, no deeds had been executed to lot claimants and they were, at that time, wholly unidentified and said trustees were the only parties who could, in the first instance, identify them, that is, declare what claimants were entitled to deeds for particular lots. Under these circumstances, it would have been necessary for appellant, who claimed the tract of land involved herein, to have waited until these various lot claimants had not only presented their applications to the trustees but had succeeded in procuring title to the several lots, even though this might and certainly would (in many instances) have required several years, by reason of successive appeals from the decisions of said trustees to the Commissioner of the General Land Office and the Secretary of the Interior, to settle conflicting claims as between said occupants.

Furthermore *bona fide* purchasers from lot claimants after the latter had received deeds from said trustees would probably have been protected against subsequent actions brought by appellant to set aside such deeds.

United States v. Wenona & St. P. R. R. Co., 165 U. S., 463; 41 L. Ed. 789.

United States v. Union P. R. R. Co., 165 U. S., 482; 41 L. Ed. 797.

It would have been practically impossible for appellant to have brought suit against each lot claimant receiving a deed from said trustees before he could

have made a conveyance to a purchaser in good faith.

It is admitted in the opinion of the Court below that, to compel plaintiff to wait until deeds were issued to the lot claimants before commencing his action, would probably work a great hardship upon him, but it is said that, "Congress has, in effect, so provided and its will is supreme." (R. p. 67.) If the Act of May 14th, 1890 so clearly enforces the interpretation given it in this case by the Court below, is it not passing strange that said Court did not discover this fact in deciding the case of Paine v. Foster et al., on rehearing, (9 Okl., 257) the opinion therein being filed November 7th, 1899 and delivered by the same Justice who delivered the opinion of the Court in the case at bar? Instead, however, of so interpreting said Act of Congress in the last decision of the Paine case, the Oklahoma Supreme Court says, "This opinion, written by Justice Burford, we now adopt as the opinion of the Court, except that part referring to defect of parties," (pp. 258-9.) thereby deciding said cause on its merits.

In support of its holding that there is a defect of parties defendant in this action, the Court below also states that, "before the trustee could defend the equitable title of the beneficiary of the deed, his power should be such as to make him the agent of such beneficiary, for under our statutes every action must be prosecuted or defended by the real party in interest." (R. pp. 60-61.) This action was commenced under the Civil Code of 1890, adopted substantially from the Warden Brief, Galley Five ..... Coffin Civil Code of the State of Indiana, which was repealed by the adoption of the Civil Code of 1893, which latter took effect August 14th, of said year, but the provisions of both Codes on the question of parties to actions are almost identical, and, so far as applicable to the question under consideration, are the following: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided," etc. Sec. 1, Art. 2, Chap. 70 Okl. Stat., 1890; sec. 26, Chap. 66, Okl. Stat. 1893.

"An executor, administrator, a trustee of an express trust or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted." Sec. 2, Art. 2, Chap. 70 Okl. Stat., 1890; Sec. 28, Chap. 66, Okl. Stat. 1893.

The rule applicable to such code provisions is correctly stated in the 15th Enc. Pl. & Pr. 731, as follows: "The provisions in the codes creating exceptions to the general rule that actions must be prosecuted by the real party in interest, although merely purporting to authorize actions by executors, administrators, trustees of express trusts, persons expressly authorized to sue, etc., have been held also to authorize actions against such persons without joining the real parties in interest." That the defendants in the case at bar were the trustees of an express trust will not be controverted, hence, it seems clear that, under the code provisions just quoted, the action can be maintained against the trustees without joining therewith the *cestui que trusts.*

It is further provided in each of said codes that: "The Court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had, without the presence of other parties, the Court must cause them to be joined as proper parties. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the Court to be made a party, it may order him to be made a party by the proper amendment." Sec. 22, Art. 2, Chap. 70, Okl. Stat., 1890; **Sec. 41 and 42, Chap. 66, Okl. Stat., 1893.**

Again, under the interpretation given by the Supreme Court of Indiana, to the Code provisions in force in Oklahoma at the time this action was commenced, the demurrer on the ground of defect of parties defendant is fatally defective as, to be sufficient in this regard, it should specifically point out and

designate the proper parties by name. Kelly v. Love, 35 Ind., 106; Durham v. Bischof, 47 Ind., 211.

Our contention on this question is that the townsite trustees were the proper parties defendant and that, upon the record in this case, the *cestuis qui trust* were neither necessary nor proper parties. We think this question is settled by the decision in the case of Vetterlein vs. Barnes, 124 U. S., 169. But the Supreme Court of Oklahoma attempts to distinguish this case and to show that it is not in point. We submit that the Oklahoma Court has misconceived the doctrine of this case. As we understand the case, it holds exactly the opposite of what the Oklahoma Court held. The principle involved is very aptly stated in Rogers vs. Rogers, 3 Paige 379 cited in Veterlein vs. Barnes, as follows:

"As a general rule, the *cestuis qui trust* as well as the trustee, must be parties, especially where the object is to enforce a claim consistent with the validity of the trust. But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same, on the ground that it is fradulent and void, he is at liberty to proceed against the fraudulent assignee or trustee, who is the holder of the legal estate in the property, without joining the *cestuis qui trust*"

The use of the word "fradulent" in the opinion, is merely accidental, not essential. It relates to the circumstance, not to the principle. The principle is that where the plaintiff attacks the trust upon an antecedent right, and seeks to have it declared void, he may proceed without joining the beneficiaries. In the Rogers case (also in the Vetterlein case) the ground of the attack was fraud, upon which it was sought to have the trust declared void. But any other ground would have answered equally well, and would not affect the principle. If the trust is void for any reason, this is sufficient. To make a distinction in the case of fraud so as to say, you may attack a trust on the ground of fraud without joining the beneficiaries, but if you at-

tack it on any other ground, you must join them, would be purely arbitrary. The trust can only be void, it cannot be more than this. If it is void, or voidable, it is not material what the ground is; it is not more void because it is fradulent. Hence, we say the use of the word "fradulent" ("fradulent and void") in the cases cited, is merely incidental, and does not go to the principle involved.

This court held in the Vetterlein case, that the beneficiaries were not necessary parties for the reason, as stated by the court, that:

"The assignment of the policies in question in trust for the wife and children of the assignor, the trust having been accepted, carried with it, by necessary implication, authority in the trustees, by suit or otherwise, to collect the insurance moneys for the beneficiaries. Indeed, they could not have otherwise fully discharged the duties they assumed as trustees. They were entitled to represent the beneficiaries in their claim for the insurance money, and were under a duty to defend any suit, the object of which was to prevent the discharge of that duty and set aside the transfer of the policies as fradulent and void."

This is in harmony with the distinction made by the authorities, and obviously supported by reason that, where the complainant claims in opposition to the trust and seeks to set aside the same on the ground that it is void, it is unnecessary to join the *cestuis qui trust*. Mr. Pomeroy has stated the principle and its underlying reasons so clearly that we cannot do better than quote his language:

"There is a broad distinction between the case of an action brought in opposition to the trust, to set aside the deed or other instrument by which it was created, and to procure it to be declared a mullity, and that of an action brought in furtherance of the trust, to enforce its provisions, to establish it as valid, or to procure it to be wound up and settled. In the first case, the suit may be maintained without the presence of the beneficiaries, since the trustees represent them all and

defend for them. In the second, all the beneficiaries must be joined, if not as plaintiffs, then as defendants, so that the whole matter may be adjusted in one proceeding, and a multiciplicity of suits avoided. The reason of this distinction is obvious. It is, that any one person interested in opposition to the trust has a right to test the validity thereof and his voluntary action cannot be controlled by the will of others, while the trustees themselves are sufficient to represent and defend all the interests of those who claim under the trust. But when the trust is assented to, and the purpose is simply to carry out its provisions, all the beneficiaries are alike interested in that object and in reaching that same result, and it is just to the trustee that the controversy should be ended in one proceeding. As illustrations of this principle: In an action brought to set aside a trust deed made by a railroad company to a trustee for the benefit of bondholders, and to restrain a sale of the road thereunder, the beneficiaries under the trust were declared not to be necessary or even proper parties, and the application of one of them—a bondholder—to be admitted as a defendant was denied, although he alleged that the trustee intended to make no defense, and was actually colluding with the plaintiff and the company." Pomeroy's Remedies, Section 357.

We claim that the trust was created in derogation of appellant's rights and is void, or voidable, as against him. We seek to strangle it in the nest. It is created, and we instantly attack it. We do not wait for the trustees to act (as by giving deeds) but we proceed at once to challenge their authority and to prevent their acting. The whole estate was held by them when we commenced our action. We could not, at that time, have joined any other persons if we had wanted to. No townsite deeds had been issued and we had no way of knowing who the beneficiaries were. Our objection was to the trust itself, not to the individuals who claimed under it; if the trust was good it was immaterial to us who the beneficiaries were. Of course,

we ask in the complaint that the trustees be decreed to hold the title in trust for us. But this is *ex necessitate*. We contend that the land should have been patented to us, but that it was wrongfully patented to the townsite trustees. Since the government has issued the patent to the townsite trustees, when it should have been issued to us, we ask that the trustees be decreed to hold the title in trust for us. There is no inconsistency in the attack which we make on the trust and the prayer of our complaint. The trust which we ask to have declared is a separate and entirely different one, being, of course, antagonistic to the trust which we seek to defeat.

It seems to us, as held by the Supreme Court of Minnesota, and as approved by Professor Pomeroy, *supra*, that, in a case like this, the beneficiaries are not only not necessary parties, but not even proper parties. So far as we have any hostility to them, it is a common, uniform and general hostility, applying to all alike. It is only a constructive hostility, dependent upon their claiming under the trust, so that if we defeat the trust we defeat all of them, and as their rights are all precisely the same, the trustees are in a position to protect all of their rights perfectly, as there is nothing for the trustees to do to protect their rights but defend the title in themselves. In defending themselves, they are defending all the beneficiaries and a in favor of the *cestuis qui trust*. The latter have no judgment in favor of the trustees is equally a judgment diverse or peculiar interests to be protected. They simply have a common interest, and the only question involved in the case is the validity of the trust which can be as perfectly tried, ascertained and determined in an action against the trustees alone as it could be if all the beneficiaries were joined. There being nothing whatever to be gained by joining the beneficiaries, it follows that it is unnecessary to join them. It was very aptly remarked in the Vetterlein case that when the trustees accepted the trust, it became a part of their duty to defend the trust, and to

endeavor to carry it into effect. It is a principle of law that a trust shall never fail for want of a trustee and it is equally a principle that the law affords a remedy to carry trusts into effect. If the trustees had failed to do their duty in this regard, by failing to defend the trust, the court would, on a proper showing, either have compelled them to defend, or have permitted the beneficiaries to intervene and do whatever was needful to protect their interests. This, however, would come within the discretionary powers of the court. It is an inherent power of the courts, and it is specifically provided by the Statutes of Oklahoma, that the court may permit parties to be brought in whenever it is necessary to accomplish the ends of justice and, in this case, if the *cestuis qui trust* had come in and shown to the court that their rights were not being properly protected there is no doubt that the court would have made such order as would have been necessary to protect their interests. We stated in the outset of our discussion of this question that, upon the record in this case, the beneficiaries were neither necessary nor proper parties. We made this statement advisedly, meaning thereby that, so far as the record shows, the trust is being fully defended. The beneficiaries have never applied to the court to be allowed to intervene as parties defendant nor is it apparent that there was anything to be gained by admitting them as such parties. Their rights are being fully protected and it would be of no advantage to them to be in the case as parties. If it were apparent on the record that their rights were being jeopardized by reason of their not being made parties, and they were asking to intervene, the court might very properly say that they ought to be made parties. But in order to require this to be done a very strong showing should be made. The Minnesota court refused to admit the beneficiaries, although it was contended that the trustee did not intend to defend the case and was actually colluding with the plaintiffs. We do not mean to indicate just what kind of a showing would have to be

made in order to justify the court in admitting the beneficiaries as parties defendant. We merely mean to say that, on a proper showing, the beneficiaries might have been admitted as such parties. It is apparent in this case that the beneficiaries have no special or peculiar rights as against the claim of appellant, but that their rights are in common, so that a defense of the trust is a full and perfect defense as to them. Under these circumstances, we have exactly the case which is presented in Vetterlein vs. Barnes, where it was held by this court that the beneficiaries were not necessary parties. In that case the trustee had accepted the trust and was performing his duty in defending it, and in doing so he was defending the beneficiaries. The same is true here. The trustees accepted the trust, and, upon the record, they are defending it. In fact, the Government itself is assisting in making this defense. To our minds, the dissenting opinion of Justice McAtee, in the case of Paine vs. Foster, et al. *supra*, states the law correctly on the question of parties and is in strict harmony with the doctrine of Vetterlein vs. Barnes, and the authorities cited in Pomeroy on Remedies, Section 357, especially Winslow v. Minn. & Pac. R. R. Co., 4 Minn., 313. See also New Jersey Franklinite Co. v. Ames, 12 N. J. Eq. 507; Wakeman v. Grover, 4 Paige Ch. 22.

As hereinbefore shown, it would have worked a very great hardship on appellant to have required him to make all the lot claimants parties defendant if, in fact, the performance of such a requirement would not have been impossible. The impracticability of making all the *cestui que trusts* parties to actions of this character is one of the principal reasons for the exception to the rule requiring them to be brought in.

"The trustees are sufficient for the purpose of this bill, which is for the selling of the pledge; it would have been intolerably oppressive and burdensome to compel the plaintiff to bring in all the *cestui que trust*. The delay and expense incident to such a proceeding would be a reflection on the justice of the court." Van

Vechten v. Terry, 2 Johns. Ch. 191.

"The impracticability of making all the persons interested parties, is a sufficient ground for dispensing with them." Land Co. v. Peck, 112 Ill., 408.

"In the case we are considering, the trustee was a proper person to represent the interest of his *cestui que trusts;* and to have required complainants, at their peril, to ascertain and bring in every person holding or beneficially interested in any one of the bonds, would have been to impose upon them a task most difficult, if not actually impossible, to be performed. It would have been almost equivalent to denying them the aid of the court in the enforcement or foreclosure of their mortgage. The holders of the bonds were not, therefore, necessary parties; and the proceedings and decree, without them, are as valid as if they had been brought in." Board of Supervisors v. Mineral Point R. R. Co. 24 Wis. 93 (See page 128).

"Where the bond holders secured by mortgage on a railroad are numerous, it is not necessary to make all of them parties to a suit, or to make any of them parties, if their trustees are parties." Campbell v. R. R. Co., 1 Woods (U. S.) 368; 4 Fed. Cases No. 2366.

"The doctrine of representation of the *cestui que trust* by his trustee is especially applicable where the beneficiaries are numerous or where for some other reason it is impracticable to make them parties." 22 Enc. Pl. & Pr. 165.

II. ON MERITS OF ACTION.

While the court below declined to determine or discuss any proposition involving the merits of this action, we shall, upon the assumption that this court will (in the event the views of the lower court are not approved)decide same on its merits, state and briefly discuss some of the principal points which we conceive to be so involved.

FIRST POINT.

Our first contention is that, under the undisputed

testimony introduced at the trial of the case of the Townsite Settlers of West Guthrie v. Mark S. Cohn, et al., before the United States land office, as shown by findings made a part of appellant's complaint, and the law applicable thereto, the half section of land involved could not have been legally occupied as a townsite until after May 14, 1890, for the reason that the east half of the same section had been previously occupied and taken as a townsite, which occupation has been, in good faith, continually followed up, and the tract was patented for townsite purposes long before any patent was so issued for the west half of said section. (R. pp. 16, 24.) We claim that, under the law governing such cases prior to May 14th, 1890, the same body or aggregation of people, at substantially the same time, could only take one-half section of contiguous land as a townsite. The last clause of section 13 of the Act of Congress opening Oklahoma to settlement is as follows:

"The Secretary of the Interior may, after said proclamation and not before, permit entry of said lands for townsites under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes, but no such entry shall embrace more than one-half section of land." (Gen. Sec. 58, Oklahoma Stat., 1893; 25 Stat. 1005.)

Does this provision mean that a large body of people, consisting of several thousand, can rush upon a half section of land and commence occupying same as a townsite and immediately thereafter, because the original tract is not sufficiently large to accommodate all who desire lots, commence to overflow upon other adjoining half sections and occupy and acquire title to them also as townsite? If such a construction is to be given this clause then what is the purpose of the limitation therein contained? It would seem absurd to hold that its only purpose was to compel the occupants, when they desired more than 320 acres of adjoining land for townsite purposes, to establish and support separate townsite organizations and make separate

entries and proof of occupancy for each 320 acre tract so desired. We think the clear and unmistakable meaning of Congress was to limit the amount of contiguous territory which could be taken and used for townsite purposes to one-half section, thus leaving all adjoining tracts for the use and benefit of those who were, in good faith, seeking homesteads. In fact, Congress, itself, has, by what is known as a legislative interpretation, given the above clause the construction just stated, by the Act of May 14th, 1890, declaring, "That so much of the public lands situated in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as townsites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of Revised Statutes as near as may be." (Sec. 118, Ok. Stat. 1893.) This act was passed after it had been made apparent to Congress that, in many instances, more than 320 acres of land in one body was and would be necessary for townsite uses in Oklahoma. But, if as many adjoining half sections as were needed for such purpose could, in any case, be taken and proved up separately under the then existing law, what was the real necessity for the latter enactment enlarging the maximum limit to 1280 acres? If several contiguous 320 acre tracts could be taken for such uses under the former enactment, it is apparent that an equal number of contiguous 1280 acre tracts can be so taken under the latter.

SECOND POINT.

But, no matter how this court may determine the proposition just urged, the Secretary of the Interior unquestionably committed manifest errors of law in deciding said land contest case in favor of the townsite

claimants, as against the rights of this appellant. Here we desire to call attention to some additional facts shown by the undisputed testimony and found by the various deciding officers of the Land Department. They are the following:

1. That, at the date of the application of James Dooley to enter said west half of section 8 as a townsite, viz: June 19, 1889, and at all times subsequent thereto down to the close of the trial of said contest case in the local land office, no person was occupying, in any manner, or making any kind of claim to any portion of the said south-west quarter of section 8, as a townsite settler or occupant. (R. pp. 17, 22.)

2. No one, as a townsite occupant, ever at any time prior to said trial, settled upon, occupied or claimed any interest in or to any portion of said South-west quarter, except upon and to the small portion thereof included within what is known as the nook or bend of the Cottonwood and on the north side of said creek—the same being about five acres in the north-east corner of said quarter section. (R. pp. 17, 24.)

3. The townsite applicants of and claimants to this five acre tract, if in fact there ever were any, were removed therefrom on the 15th day of June, 1889, by the military forces and none of the parties so removed ever attempted to re-settle or re-locate upon any portion of said quarter section, and never thereafter laid any claim to any portion thereof. (R. p. 17.)

The register and receiver of the Guthrie land office make, among others, the following findings of fact relative to the settlement, occupancy and improvement of the different legal subdivisions of the west half of said section 8, by townsite claimants:

"The east half of section 8 and the west half of section 9 were settled upon by several thousand people for business and trade by 3 o'clock p. m., April, 1889. At about 4 o'clock of said day from 150 to 200 people crossed said Cottonwood creek at a point on the north-east forty of the south-west quarter of said section and staked off lots on a part of said forty north

of said creek and also upon the north-west quarter of said section, also upon that part of the north-east quarter of said section which lies west of said creek. Such persons then and for two or three days thereafter, believed that all west of the creek was on the west half of said section. On the evening of April 22, 1889, said people held a mass-meeting and organized a town to be known as West Guthrie, to be located on the west half of said section eight and elected town officers and took steps at a meeting held on the following night to have said half section surveyed into lots, blocks, streets and alleys, which survey of all that part of said half section north and west of said creek, to-wit: the north-west quarter and a part of the north-east forty of the south-west quarter of said section, was completed during the early part of May of said year. Some of the persons who went upon the north-east forty of the south-west quarter of said section, remained on the lots staked by them. Other persons settled upon said forty acre tract and claimed lots, aggregating 30 or 40 in number on June 15, 1889. They, prior to that date, had planted garden, fenced lots, erected tents and a few small buildings, built foundations and began the erection of houses. On said date they, by the military forces of the United States, at the instance of some one of the homestead claimants, but which one does not appear, were ejected from said tract of land, and their improvements removed, for the reason given that the land had been taken as a homestead. Since said date and said removal, said tract has not been occupied by townsite claimants. The part of said south-west quarter, of said section south of said creek, to-wit: the south half and the north-west quarter, has never been surveyed into lots, blocks, streets and alleys." (R. p. 17.)

None of these findings of fact were disturbed, but, in fact, all were affirmed both by the Commissioner of the General Land Office and the Secretary of the Interior. The following findings of fact, relative to the townsite settlement, occupancy and improvement of the west half of said section 8, are also contained

among those made by the Commissioner:

"The townsite settlement on the north-west quarter of section 8 has been continuous since the first rush until the day of hearing, at which time 400 people resided and did business thereon, with improvements to the value of $30,000.00. This settlement and improvement on the south-west quarter of section 8 was more meagre and appeared to have been confined to the north-east quarter of the south-west quarter and more particular to the neck of land formed on the north side thereof by a crook in the creek; some of the townsite settlers remained, and on June 15th, 1889, numbered about 30 or 40 having houses, gardens, etc. On that day the military forces of the United States ejected these settlers in the interest of some of the homestead claimants and removed their improvements." (R. p. 24.)

These findings, as well as all others made by the Commissioner are specifically approved by the Secretary, the latter saying in his decision of December 16th, 1891:

"The voluminous record in this case has been examined, and it has been found that your decision contains a succinct statement of the facts in the case." (R. p. 31.)

Upon the law question presented by the foregoing facts the register and receiver make the following conclusion and recommendation:

"Remaining portions of said south-west quarter, (meaning all that portion thereof except the small tract contained in the neck formed by a bend in the Cottonwood creek and on the north side of said creek) have never been surveyed into lots, blocks, streets or alleys, and have never been settled upon and occupied for the purpose of business and trade. The rights of several homestead claimants attached before an application was made to enter the same as part of West Guthrie and are superior to the claim made to the same for the purpose of business and trade. We, therefore, recommend that homestead entry No. 1 of Mark S.

Cohn and homestead entry No. 17 of James W. Feagins be held for cancellation; that on proper application therefor, the occupants of the north-west quarter and the north-east quarter of the south-west quarter, Tp. 16 North, Range 2 West, be allowed to make entry of the same under the provisions of the act of May 14, 1890, and that a hearing be ordered to determine the rights of the several homestead claimants to the residue of the said south-west quarter." (R. p. 22.)

The Commissioner held as follows thereon:

"The original Oklahoma Act provided for the townsite entries not to exceed 320 acres, but no provision was made as to the proper method of making such entries. The Act of May 14, 1890, relieved this question, and ratified the applications then pending. Although the town did not at date of such application cover or occupy each legal subdivision, the occupation of any portion of the land selected and settled upon by 100 or more inhabitants warranted the selection of 320 acres and the consequent withdrawal of the entire tract. You seem to have been guided by a contrary view and awarded to the town the north-west quarter and the north-east quarter of the south-west quarter of section 8, as being the tracts actually settled for town purposes. In this you erred. Up to and prior to the Act of May 14, 1890, the settlement by 100 persons on any portion of this land was sufficient to warrant the townsite application for the entire west ½ of said section. * * * * * If, however, on May 14, 1890, the date of the passage of the act above referred to, the town did not occupy each legal subdivision of the land claimed by it and a qualified homesteader made a valid settlement on such unoccupied subdivision prior to such occupation of the town, such a settler should be allowed to make an entry thereof. This, however, can only be determined when the town offers to make proof and payment, when such a settler may be heard and allowed to show his right in the premises. This would appear to be the position of Maples, or, in the event of his demise, of Bockfinger." (R. p. 30.)

The Secretary modified the holding of the Commissioner upon this legal proposition and rendered the following decision thereon:

"I cannot affirm that part of your decision holding that townsite entries cannot be made under the Oklahoma townsite act of May 14, 1890, (26 Stat. 109), for legal subdivisions not actually occupied for municipal purposes at the date of the passage of the act above cited. Under said act 100 people or more may select 320 acres of land in Oklahoma Territory for a townsite, although they may not at the date of the selection or of the townsite act, use such smallest subdivisions thereof fo r municipal purposes. * * * * * After the settlers of West Guthrie had made their selection of the west half of said section for townsite purposes and taken possession thereof on April 22, at about 4 o'clock p. m., the time had passed when any one could initiate a homestead claim for any part thereof, and the fact that a portion of the tract embracing about 120 acres has not yet been settled upon as a place of residence will not prevent said portion from being included in the townsite entry. Towns are not built in a day, and from the very nature of things they should not be required to improve each of the smallest legal subdivisions in their selection before making entry, any more than a homestead claimant should be required to improve each 40 acres making up his homestead before making final entry." (R. pp. 31, 32.)

This decision is palpably erroneous. The portion of section 1 of the Act of May 14, 1890, hereinbefore quoted, specifically provides that, only "so much of the public lands situated in" this Territory "as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business * * * * * may be entered as townsites." The only authorities cited by Secretary Noble in support of the foregoing holding are his own decisions in the cases of Norman Townsite vs. Blakeney, 13 L. D. 399 and Walker vs. Lexington Townsite, Ibid 404 and

these are based almost entirely upon an opinion given July 2, 1856, by Attorney General Cushing, construing the act of May 23, 1844, (5 Stat. 657) entitled "An Act for the relief of the citizens of towns upon the lands of the United States, under certain circumstances," which undoubtedly had reference more particularly to towns already in existence. In his opinion, however, Attorney General Cushing seems to have held that, under this act, a half section of land might be segregated for a townsite by a sufficient occupation, for actual business and residence purposes, of any one or more of the legal subdivision thereof, providing each of the other legal subdivisions were in use for townsite purposes at the date of entry. (7 Opinions Attorney General, 738.)

Said act provides, among other things, "That whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a townsite, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judges of the county court for the county in which such town may be situated, to enter, at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; * * * * * That the entry of the land intended by this act be made prior to the commencement of the public sale of the body of the land in which it is included, and that the entry shall include only such land as is actually occupied by the town, and be made in conformity with the legal subdivisions of the public lands authorized by the act of the twenty-fourth April, one thousand eight hundred and twenty, and shall not in the whole exceed three hundred and twenty acres."

It is apparent that in an old established town many portions of the site may be used and, in that sense, occupied for municipal purposes, although not "covered by actual occupancy for purposes of trade

and business," as required by the act of May 14, 1890.

It is quite doubtful, however, whether, under the statute of 1844, Mr. Cushing's opinion did not too greatly expand the limitations contained in the act. He says: "In regard to agricultural occupation, the laws provide that, in certain cases and conditions, one person may pre-empt one hundred and sixty acres, and that in regard to municipal occupation a plurality of persons may, in certain cases and conditions pre-empt three hundred and twenty acres. In the latter contingency, there is no special privilege as to quantity, but a disability rather; for two persons together may pre-empt three hundred and twenty acres by agricultural occupation, and afterwards convert the land into a townsite, and four persons together might in the same way secure six hundred and forty acres, to be converted ultimately into the site of a town; while the same four persons, selecting land for a townsite, can take only three hundred and twenty acres. In both forms the parties enter at the minimum price of the public lands. (The chief advantage, which the pre-emptors for municipal purposes enjoy, is, that they have by statute a preference over agricultural pre-emption. In all other respects material to the present inquiry, we may assume, for the argument's sake at least, that the two classes, stand on a footing of equality, as respects either the conflicting interests of third persons, or the rights of the government.

Now the rights of an agricultural pre-emptor we understand. He is entitled, if he shall make settlement in person on the public lands and shall inhabit and improve the same, and shall erect a dwelling thereon, to enter, by legal subdivisions any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, (Act of 1841, s. 10.) and of two settlers on the same quarter section of land, the earlier one is to have the preference. (Sec. 11.)

Now, was it ever imagined that such claimant must personally inhabit every quarter-quarter section

of his claim? That he must have under cultivation every quarter quarter section? And that, if he failed to do this, any such quarter of his quarter section might be pre-empted by a later occupant?

Why should there be a different rule in regard to occupants for municipal pre-emption? The latter is, by the very tenor of the law, the preferred object. Why should those interested in it be subject to special disabilities of competing occupancy? I cannot conceive."

With due respect to the distinguished ability of the lawyer who was then Attorney General we think he failed to notice a clear distinction between the pre-emption and townsite acts as regards the necessity of occupancy. To authorize a party, otherwise qualified, to make a pre-emption entry of a quarter section of public land, it was only necessary that he make a settlement in person thereon and to inhabit and improve same or erect a dwelling thereon. Sec. 10, Act, May 4, 1841. (5 Stat. 455.) Such a claimant's entry was not limited in amount to "such land as is actually occupied by" him as was that of the townsite claimants by the act of 1844. In a decision rendered on June 26, 1858, (two years later than that of Mr. Cushing) the Secretary of the Interior made the proper distinction as to the limitation imposed by these acts. He says, "The title, as well as the words employed in the body of the act, clearly demonstrate that the same was intended to apply exclusively to actual and existing towns * * * * * Referring to the title of the act, 'for the relief of citizens of towns' etc., it may be easily determined that by the term 'occupants' is meant those who are settlers and residents, and that it only embraces the citizens thereof. * * * * The limitary words of the two statutes (1841 and 1844) are essentially different. The one limits the entry to such lands as are actually occupied by the town; the other gives the right of acquiring any number of acres not exceeding a quarter section. * * * * The mere selection by persons claiming to be the proprietors of a townsite, who do not reside thereon, of portions of the public lands, with

a view of making improvements at a future time, does not exempt such lands from the operation of the act of 4th of September, 1841. The act of 23rd May, 1844, authorizes the entry of any portion of the surveyed public lands which have been, or shall be, settled upon and occupied as a townsite, and, therefore, not subject to entry under the existing pre-emption laws. It also requires that the entry shall be made in trust for the several use and benefit of the occupants thereof, and such entry will embrace only such legal subdivisions as are actually occupied by the town." 1 Lester, 433. (435); see also Lechler vs. Chapin 12 Nev. 72 and cases cited.

In the case at bar, both the Commissioner and Secretary fall into grevious error by assuming that section 2389 (R. S. U. S.), which seems (or rather has been construed) to authorize the segregation and entry of 320 acres of public land as a townsite when any portion thereof is actually occupied for purposes of business and trade by as many as 100 people, has also been adopted as a part of the townsite laws of Oklahoma by the Acts of March 2, 1889, and May 14, 1890, *supra*. In the former Act sections 2387 and 2388 were specifically referred to and adopted and in the latter only section 2387. Where a less number than 100 townsite occupants apply to make entry of a portion of the public lands for such purposes, it has been the uniform ruling of the Secretary of the Interior that they are only entitled to enter the legal subdivisions thereof that are actually occupied for purposes of business and trade. Circular instructions approved November 5, 1886, and April 1, 1889, 5 L. D. 295; 8 L. D. 337. We confidently claim that, as section 2389 (R. S.) has never been made a part of the townsite laws of this Territory, the rule requiring actual occupancy of each legal subdivision of the land so entered is the same whether there are as many as 100 inhabitants thereof or a less number. Especially is this so under the Act of May 14, 1890. By what authority can the Secretary say that Congress did not mean to require actual oc-

cupancy, "for purposes of trade and business," of each legal subdivision entered, when the act expressly and unequivocally declares that such is required. If there are doubts as to the requirements of former statutes, in this regard, there certainly can be none concerning the meaning of this last enactment. Furthermore, as hereinbefore clearly shown, the selection of the townsite of West Guthrie was for the purpose of securing an entry additional to the prior townsite entry of Guthrie Proper, and, if this could legally be done when the first selected townsite contained the maximum amount which could then be entered, it is certain that only such legal subdivisions could be included in the additional entry as are actually occupied for townsite purposes. West Reno City vs. Snowden, 23 L. D. 74. Relative to the character of, and weight to be given, decisions of the Land Department, we fully concur with the following expressions of Chief Justice Horton in Emsley vs. Young, 24 Kas. 744, to-wit: "The decisions of the Land Department, having been so various, changeable and conflicting, relative to the interpretation of the land grants of Congress and the rights of pre-emption and homestead settlers thereunder, cannot greatly aid us in reaching the true construction of the statute; much less can we regard such decisions as conclusive, or the decision of the Secretary of the Interior in this case as *res adjusticata*."

That courts of equity have power to correct mistakes of the Secretary of the Interior in construing the law, see;

Johnson vs. Towsley, 14 Wal. 84.
Moore vs. Robins, 96, U. S. 534.
Quimby vs. Conlan, 104, U. S. 420.
Cornelius vs. Kessell, 128 U. S. 456.

We also insist that all of the department officers erred in holding, as a legal proposition, that the settlement and occupancy, prior to June 15, 1889, of the five acre tract on the north-east corner of the quarter section involved could, in any manner, aid the occupants of the north-west quarter of the same section in ac-

quiring title to any portion of the former quarter, it being undisputed that none of the settlers on said five acre tract ever appeared after June 15, 1889, to make any further claim because of their said former settlements thereon.

Again, the affidavits in support of Bockfinger's motion for a rehearing of said land case, show, beyond question, that no townsite settlement or occupation of any kind whatever was ever made upon any portion of the quarter section herein involved and that he (Bockfinger) had not been guilty of any *laches* in failing to produce these facts earlier (R. pp. 38 to 47.) The Secretary practically admits the force of this showing in his decision of October 13, 1892. He says: "The attorneys for Bockfinger have filed a motion for rehearing in this case on the ground of newly discovered Warden Brief, Galley Eleven ..... D O L evidence, supporting the same by affidavits of various parties. These affidavits are to the effect that no selection was made of the S. W. ¼ of Sec. 8 for townsite purposes prior to June 15, 1889. * * * * *

It may be admitted for the purpose of the present discussion that these affidavits set forth the facts actually existing, and still they afford no sufficient reason for a new hearing in view of the status we have determined Bockfinger occupies in this case. They do not controvert the conclusion that the land was actually settled by the townsite prior to Bockfinger's settlement, but on the other hand, tend strongly to support it, and hence do not aid his claim as a settler. And if, as heretofore concluded, he has secured no right as a contestant to enter said land, a new hearing which would establish the facts as set forth in these affidavits could not confer such a right on him. For these reasons the motion for a rehearing is hereby denied." (R. P. 37.)

The statement of the Secretary "that the land was actually settled by the townsite prior to Bockfinger's settlement" if intended to apply to the south-west quarter of section 8—being the quarter here in controversy

—is, as already seen, absolutely without support in the testimony or findings based thereon except the alleged settlement made on said five acre tract prior to June 15, 1889. An finding of fact which there is no evidence tending fairly to support is error of law. Pollock vs. Pollock. 71 N. Y. 137.

THIRD POINT.

The Secretary of the Interior committed error of law in holding, in his decision of October 13, 1892, that Bockfinger had no sufficient interest, either as contestant or settler, in the quarter section of land in question to give him any standing as an adverse claimant to the townsite occupants. The undisputed facts, which are also specifically found by the register and receiver and the Commissioner and approved by the Secretary, show that Bockfinger was (in effect) the second contestant of Feagins' entry and that he also charged Maples, the first contestant, with being disqualified to make homestead entry; also that his contest was filed long prior to the application to enter made by the townsite settlers; that on April 20, 1890, he established his residence upon said tract and continuously resided thereon up to the date of trial when he had the following improvements: a dwelling 14 by 16 feet in size, 2 acres broken and planted to crop and some fencing, he having expended on improvements about $250.00; (R. pp. 12, 20.) that both Maples, the first contestant, and Feagins, the entryman, acquiesced in departmental decision of December 16th, 1891, hence the same, after 30 days from the date they received notice thereof, became final as to them. Then, at the date of the Secretary's last decision, Bockfinger was the only remaining homestead claimant for this particular quarter section and was still an actual occupant thereof. Waiving, for purposes of this argument, all rights which he acquired by reason of his contest, still his rights as a settler were ample to entitle him to the land as against these townsite claimants.

One who occupies land covered by an entry is, as

against a subsequent occupant or occupants, preferred.

Geer vs. Farrington, 4 L. D. 410.

Smith vs. Place, 13 L. D. 214.

On cancellation of an entry the rights of a qualified settler residing on the land covered thereby at the date of cancellation attach *eo instanti*.

Pool vs. Malaughney, 11 L. D. 197.

Wiley vs. Raymond, 6 L. D. 246.

Stone vs. Cowles, 13 L. D. 192.

Blauvett vs. Masden, 18 L. D. 538.

McMichael vs. Murphy, et al., 20 L. D. 147.

Dawman vs. Moos, 19 L. D. 526.

The first settler, in point of time, upon a tract of public land subject to homestead entry, all other things being equal, will be given precedence upon the relinquishment or cancellation of the record entry.

Pool vs. Melaughney, *Supra*.

Spring vs. Reinbold, 25 L. D. 37.

Giles vs. Troop, Ibid, 448.

Feagins' entry was finally cancelled by departmental decision of December 16, 1891, (R. p. 30) and it is conceded that there were no townsite occupants of the quarter seciton in controversy at that time, and had been none since Julp 15, 1889, (R. pp. 17, 22.) while Bockfinger was still (and had been since April 20, 1890) an occupying claimant thereof under the homestead law. (R. pp. 8, 9.) Unquestionably then, under the rule laid down by the foregoing land decisions, his rights as such claimant attached *eo instanti* upon the cancellation of said entry and before any rights could have been acquired by a subsequent townsite occupation of said tract.

At the date of the Secretary's last decision, Bockfinger was the only remaining homestead claimant and, as such, had a vested equitable interest in and right to this land both as a contestant therefor and occupant thereof. In fact, the Secretary's decision as to Bockfinger's status and right as such contestant and occupant is so manifestly erroneous that we deem it useless to spend more time in the discussion thereof.

FOURTH POINT.

As the townsite settlers never appealed from the findings, decision and recommendation of the register and receiver of the local land office they are bound thereby and for this reason as well as for the others already assigned the Secretary erred in awarding the W. ½ and S. W. ¼ of said Section 8 to the townsite. (R. p. 7.)

Respectfully Submitted,

JAMES R. KEATON.
JOHN W. SHARTEL,
FRANK WELLS,
JOHN H. COTTERAL,
C. G. HORNOR,
FOR APPELLANT.

APPENDIX.

The United States of America.

To all to whom these presents shall come, Greeting:

Certificate No. 958.

Whereas, John Foster, W. S. Robertson and A. C. Schnell, Townsite Board No. 6 assigned to West Guthrie, in Logan County, Oklahoma Territory, in trust for the several use and benefit of the occupants of the Townsite of West Guthrie in said County and Territory, according to their respective interests, have deposited in the General Land Office of the United States, a Certificate of the Register of the Land Office at Guthrie, Oklahoma Territory, whereby it appears that full payment has been made by the said John Foster, W. S. Robertson and A. C. Schnell, Trustees as aforesaid in trust as aforesaid, according to the provisions of the Act of Congress of the 24th of April, 1820 entitled "An Act

making further provision for the sale of the Public Lands" and the Acts supplemental thereto, including the Act of May 14, 1890, for the West half of Section eight in Township sixteen North of Range two West of Indian Meridian in Oklahoma Territory, excepting a reservation for park purposes described as follows: (Commencing at a stake forty feet West and forty feet South of the North-East corner of the South-west quarter of the aforesaid section eight; Thence South, eighty-nine degrees and forty-one minutes, West six hundred and eighty feet to a stake; Thence South one thousand and sixty feet to a stake; Thence North eighty-nine degrees and forty-one minutes East, two hundred and seventy feet and eight tenths to a stake; Thence South, thirty-seven degrees East, one hundred feet to a stake; Thence South, fifty-five degrees East, One hundred and seventy-five feet to a stake; Thence South eighty-eight degrees East, two hundred and four feet and five tenths to a stake; Thence North twelve hundred and fifty feet to the place of beginning, containing seventeen acres and nine tenths of an acre), said Townsite containing three hundred and two acres and one tenth of an acre, according to the Official Plat of the survey of the said Lands returned to the General Land Office by the Surveyor General which said Tract has been purchased by the said John Foster, W. S. Robertson and A. C. Schnell, Trustees as aforesaid, in trust as aforesaid.

Now, know Ye, That the United States of America in consideration of the premises and in conformity with the several Acts of Congress in such case made and provided, Have Given and Granted and by these presents Do Give and Grant unto the said John Foster, W. S. Robertson and A. C. Schnell Trustees, as aforesaid, in trust as aforesaid and to their successors, the said tract above described: To Have and To Hold the same together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said John Foster, W. S. Robertson and A. C. Schnell Trustees as aforesaid, in trust as aforesaid

and to their successors and assigns in trust as aforesaid.

In testimony whereof I, Benjamin Harrison President of the United States of America, have caused these letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington the sixteenth day of February in the year of our Lord, One Hundred eightcmfwyp cmfwyp cmfwpy cmfwy **One Thousand Eight Hundred and Ninety-three and** of the Independence of the United States the One Hundred and Seventeenth.

(SEAL.)

By the President, Benjamin Harrison.

By E. Macfarland, Asst. Secretary.

D. P. Roberts, Recorder of the General Land Office.

Rec. Miscl. Vol. II. Pages 71 and 72.

The Territory of Oklahoma, Logan County, S. S.

This instrument was filed for record on the 25th day of February A. D., 1893, at 11 o'clock A. M. and duly recorded.

G. H. DODSON,
Register of Deeds.

Territory of Oklahoma, County of Logan, ss.

I, J. S. Mabon, Register of Deeds in and for said County and Territory, do hereby certify that the within and foregoing instrument is a full, true and correct copy of such an instrument as it is recorded in Book 7 of Deeds, on pages 350 and 351, of the record in my office.

Witness my hand and official seal on this 28th day of January, 1903.

(SEAL.)

J. S. MABON,
Register of Deeds.

By H. A. HERWIG, Dept.

2025

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 3 1903
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 175.

HENRY H. BROCKFINGER, APPELLANT,

vs.

JOHN W. FOSTER, W. S. ROBERTSON, AND A. C. SCHNELL, TRUSTEES OF TOWN-SITE BOARD No. 6, OKLAHOMA TERRITORY, APPELLEES.

REPLY BRIEF FOR APPELLANT.

In reply to some of the propositions suggested by counsel for appellees in their brief and oral argument, I submit, with leave of the court, the following additional suggestions and citation of authorities:

Said counsel strongly insist that this land was donated by Congress to these town-site trustees for the uses and purposes prescribed in the act of May 14, 1890 (26 Stat. 109), and then proceed to argue this proposition as though this particular land had been reserved by Congress from settlement and entry under the Homestead Law. This position is wholly untenable. It was only by reason of the erroneous rulings of the Secretary of the Interior that this particular land was awarded to the town-site claimants and

the patent therefore issued to the town-site trustees; hence said land was at all times subject to appropriation by a qualified homestead claimant until a legal town-site selection had been made, which appellant claims was never done.

This conveyance was not made to these trustees for any charitable use, nor was it in any sense a donation, as the regular purchase price for the land was paid by them and is duly acknowledged in the patent (see appendix to appellant's original brief, pages 39–40).

Great stress is laid by said counsel upon the fact that this conveyance was made to said trustees for certain specific uses, and that they had no authority to dispose of the land in any other way; but as stated in original brief, this in no wise limits or qualifies the fee (see p. 12). In addition to the authorities cited in said former brief on this question, I call special attention to Long *vs.* Moore, 48 S. W. 43, wherein the following language is quoted with approval from the case of Olcott *vs.* Gabert, 86 Tex. 123, 23 S. W. 985, to wit:

> "There are no conditions subsequent expressed, and, although they may be implied, they are not favored in law. It may be that the consideration expressed should be deemed nominal, and that the conveyance should be treated as voluntary, and it is true that a condition will be more readily implied in a deed of that character than in one which rests upon a valuable consideration. Yet the rule is well recognized that the mere declaration of the uses to which the granted premises are to be applied does not ordinarily import a condition. Where the declared purpose for which the property shall be used is a matter that will inure to the special benefit of the grantor, the courts are more inclined to treat the conveyance as conditional than when, as in this case, the use is for the benefit of a special class of persons or of the public at large. In this case it does not appear that the maintenance of a church upon the lots was a matter specially advantageous to the railroad company who made the grant."

It is worthy of observation that the declared purpose for which the land in controversy was conveyed by the Government was, in no event, to inure to the benefit of the grantor, but was solely for the benefit of the town-site claimants, beneficiaries under the patent. See also on this point, Farnham *vs.* Thompson, 34 Minn. 331, wherein it is held that—

> "in a conveyance of land to a religious corporation the words 'for the purpose of erecting a church thereon only' following the description of the property do not of themselves create a condition subsequent.

And Ryan *vs.* Porter, 61 Tex. 106, wherein it is held that—

> "Courts, either of law or equity, will adopt any reasonable construction consistent with the terms of an instrument that will defeat the springing of an implied condition subsequent in a grant.
>
> "The conveyance to the trustees was not made on a condition subsequent, a failure to comply with which would work a forfeiture of the land.
>
> "The grantor divested himself of title to the property unconditionally, and invested the fee in the trustees for the benefit of the Methodist Church, South, limiting the use of the property to the class of preachers named."

Said counsel also contend that the patent issued to said trustees under the authority of said act—

> "was merely the conveyance, by authority of Congress, of the title to the land from one set of officers of the United States to another for the purposes of administrative convenience, and that the real title was just as fully in the United States and its officers after such patent was executed and delivered as it was while the land remained strictly a part of the public domain" (brief, p. 9).

In reply to this contention, I submit that the title to this land, so long as it remained a part of the public domain, was vested exclusively in the United States and no part of

it in any officer or set of officers thereof. Hence, the effect of such conveyance could not possibly have been merely to transfer the title from one set of Government officers to another. In fact, the Government has never yet held title to public land as a tenant in common with any of its officers or agents, and has not been in the habit of selling such land and issuing patents therefor to such officers or agents without intending thereby to divest itself of title to the land so conveyed; and, if it be conceded that the legal title to the land in controversy had passed from the Government itself when this action was brought, then it matters not in what set of officers or agents such title vested, as they could properly be sued by one having prior and paramount equities in the land. United States *vs.* Lee, 106 U. S. 196. Otherwise the title to public land might be wrongfully passed from the United States and vested perpetually in Government officers, and thereby forever preclude the party to whom the land should rightfully have been patented from invoking the powers of a court of equity to procure relief from the wrongful action of the Executive Department in so conveying said land to such officers. On this proposition counsel for appellees say:

> "By the act of Congress machinery was provided whereby the United States could execute such a conveyance to its officers, the town-site trustees, for certain purposes and those purposes only, and this, except for those purposes, leaves not only the title but the equitable interest in the lands combined in the United States and not in the trustees, so as to create an indefeasible title and private right in the latter. This doctrine was undoubtedly that contended for by the United States attorney in the court below, and entertained and adopted by the court below in holding the demurrer good" (pp. 9–10).

As already shown, this position of counsel is not maintainable because, by the terms of the patent, a conveyance in fee is made to said trustees, as there are no words of

limitation nor any condition subsequent contained therein. As stated in appellant's original brief (Rec., p. 11), the supervisory power vested by said act of May 14, 1890, in the Secretary of the Interior could as well have been vested by Congress in some other person, body, or tribunal, as was done in previous town-site legislation (see section 2387, R. S., 5 L. D. 267). It could as consistently be contended that, because under the said former town-site Acts of Congress a supervisory power was vested in "the legislative authority of the State or Territory in which the same may be situated," the title to the land conveyed by patent to the corporate authorities of such town (if incorporated) or the judge of the county court for the county in which the town is situated, if not incorporated, did not fully pass from the United States.

It was also contended by said counsel, in the oral argument, that under no circumstances could appellant be entitled to the relief prayed for in his complaint, which said prayer is, in substance, that the town-site trustees be decreed to hold the land as trustees for the use and benefit of appellant, and ordered to make a proper conveyance to him therefor (Rec. p. 15).

In reply to this contention I submit that, if appellant is entitled to any relief whatever, it is that prayed for in his bill, as this is the only way for a person having a superior equity in public land to enforce same after a patent has been wrongfully issued to another party. See the recent case of James *vs.* Germania Iron Co., 107 Federal, 597, and cases therein cited. Of course it is not essential and hardly expected that the trustees would make the conveyance in compliance with a decree as prayed for by appellant, but the decree itself would operate to effectively invest him with both the legal and equitable title to the land. Steel's Lessees *vs.* Spencer, 1 Pet. 558.

In addition to the land decisions cited in appellant's original brief, at page 38, to the effect that the settlement

rights of one occupying land covered by a homestead entry as a homestead claimant attach *eo instanti* upon the removal of such former entry. See Moss *vs.* Dowman, 176 U. S. 413. However, as counsel for appellees have declined to discuss in their brief any proposition going to the merits of this controversy, and, as the court below did not determine or discuss any such proposition, it is surely unnecessary to consume further time in elaborating said propositions on behalf of appellant.

Respectfully submitted,

JAMES R. KEATON,
For Appellant.

NOTE.—There are several typographical and other errors in the printing of appellant's original brief, some which, without correction, will doubtless tend to confuse the court; hence the following explanation is offered:

1. Commencing with the word "Also" in the 11th line from the top of page 6, the remainder of said paragraph should read as follows:

> "Also, that he made a tender to said trustees prior to the commencement of this action of a sufficient amount to fully reimburse them for the sums expended in procuring patent for said tract."

2. The word "claiming" in the 1st line from top of page 10 should have been "which."

3. Commencing with the word "In" in the 15th line from the bottom of page 20, the following two sentences should read thus:

> "In defending themselves they are defending all the beneficiaries, and a judgment in favor of the trustees is equally a judgment in favor of the *cestuis que trust*. The latter have no diverse or peculiar interest to be protected."

5. On page 34 of said brief the citation of page "295" in 5 L. D. should have been page 265.

2025

No. 175.
Motion as to taxation of costs.

Office Supreme Court U.S.
FILED
OCT 27 1902
JAMES H. McKENNEY,
Clerk

Filed Oct. 27, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 175.

HENRY H. BOCKFINGER, APPELLANT,

vs.

JOHN W. FOSTER ET AL.

MOTION FOR AN ORDER IN THE MATTER OF TAXATION OF COSTS FOR PRINTING RECORD.

JAMES R. KEATON,
Attorney for Appellant.

(18,289.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4532

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 175.

HENRY H. BOCKFINGER, APPELLANT,

vs.

JOHN W. FOSTER ET AL., APPELLEES.

Motion for an Order in the Matter of Taxation of Costs for Printing Record.

Now comes the above-named appellant, by his attorney, James R. Keaton, and moves the court to authorize and direct the clerk to print the record filed in this cause upon payment by the appellant of the costs and fees calculated upon that portion of the said record other than "Exhibit A," attached thereto, for the following reasons:

It appears that the record as filed in this court consists of 124 pages of matter properly and necessarily included, the greater portion of which should be printed, to which, however, has been added as "Exhibit A," through the oversight or error of counsel in the court below, 1,044 pages, which include a duplicate copy of the testimony and other pro-

ceedings taken at the trial in the United States land office at Guthrie, Oklahoma, of the issues arising between the homestead and town-site claimants for the entire west half of section 8, township 16 north, of range 2 west, I. M., all of this added matter as "Exhibit A" being now unnecessary and unavailable for the purpose of determining any of the issues now involved in said above-entitled cause, and the parties thereto have stipulated that it is not necessary to be and shall not be printed.

The clerk of this court, however, considers it his duty, under the last clause of rule 10, to require the appellant to pay the regular fee for supervision of this portion of the record, though the stipulation above mentioned makes it wholly unnecessary and impossible for him to perform any service in relation to the 1,044 pages thereby eliminated. The fee, calculated under the rule, for such supervision of the unprinted matter contained in said "Exhibit A" so attached to the record herein amounts to $665, whereas the fee for the actual supervision of the printing of the record proper, most of which is to be printed, amounts to only $125.

While it is not intended by this motion to question the correctness of the interpretation placed upon said last clause of rule 10 by the clerk, it is respectfully submitted that, in this instance, such interpretation works a hardship entirely out of proportion to the proper value of the clerk's services, and such as is not within the contemplation of the rule.

Appellant, therefore, prays that, in view of the exceptional character of the record in this case and the peculiar circumstances under which said hardship has been cast upon him, this court pass an order which will authorize the

clerk to print the record upon the payment of the fees properly calculable upon the record proper after excluding said portion contained in said "Exhibit A," and thereby relieve this appellant from the payment of an unearned and unnecessary fee.

Respectfully submitted.

JAMES R. KEATON,
Attorney for Appellant.

Service of a copy of the foregoing motion is hereby accepted by counsel for the appellees in the above-entitled cause. It is agreed by the undersigned that the printing of "Exhibit A," mentioned in the motion, is unnecessary for the proper presentation and consideration of the questions involved in the cause; and accordingly a stipulation to omit such "Exhibit A" in the printing of the record has been entered into.

MARSDEN C. BURCH,
Counsel for Appellees.

2020

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

HENRY H. BOCKFINGER, APPELLANT,
v.
JOHN W. FOSTER, W. S. ROBERTSON, AND A. C. Schnell, trustees of Town Site Board No. 6, Oklahoma Territory. } No. 175.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

BRIEF FOR APPELLEES.

STATEMENT.

The statement of the case made by counsel for appellant seems to be fair and accurate, and sets forth with sufficient regard to detail all necessary facts involved in the issue at present before this court. There seem to be but two questions involved:

First. Whether a suit in equity will lie against the defendants, who are town-site trustees under the act of Congress applicable to Oklahoma.

Second. Whether, if such action would lie against them, the town-lot claimants to whom they have conveyed should not necessarily be joined as codefendants in the suit.

ARGUMENT.

CAN THIS ACTION BE MAINTAINED AGAINST DEFENDANTS?

The facts and circumstances set forth by appellant in their brief, in all essential particulars, bring this case exactly in line with that of *McDaid* v. *Oklahoma* (150 U. S., 209), except that in that case the remedy sought was mandamus, and it was invoked to compel McDaid and the other town site trustees to issue a patent for certain lots to the relator, Smith, without allowing the contesting claimants for such lots an appeal to the General Land Office and the Secretary of the Interior, while in this case it is sought by a proceeding in the nature of a bill in equity to establish a resulting trust in the town site trustees in favor of the complainant, Bockfinger, who sought to hold a part of the town site as a homestead.

The real question involved in both cases is whether the town site trustees are in law and in fact officers of the United States holding the property involved in the issue for and in behalf of the United States; or whether by virtue of their patent from the United States issued to them as such trustees, and so expressly conveying to them in terms, the United States is so far divested of title as to constitute the land in question a private right in the trustees' hands.

For the purpose of ready reference by the court, and inasmuch as the appellant's brief does not contain the same, we think it proper to quote the statute by virtue of which the patents in question were issued to the town-site trustees (26 Stat. L., 109):

Be it enacted, etc., That so much of the public lands situate in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as town sites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees, including the survey of the land into streets, alleys, squares, blocks, and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such town site, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees:

Provided, That the Secretary of the Interior may, when practicable, cause more than one town site to be entered and the trust thereby created executed in the manner herein provided by a single board of trustees, but not more than seven boards of trustees in all shall be appointed for said Territory, and no more than two members of any of said boards shall be appointed from one political party.

SEC. 2. That in the execution of such trust and for the purpose of the conveyance of title by said trustees, any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any town site, the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be *prima facie* evidence of the claim of occupancy of the holder.

Provided, That nothing in this act contained shall be so construed as to make valid any claim now invalid of those who entered upon and occupied said lands in violation of the laws of the United States or the proclamation of the President thereunder: *Provided further*, That the certificates hereinbefore mentioned shall not be taken as evidence in favor of any person claiming lots who entered upon said lots in violation of law or the proclamation of the President thereunder.

SEC. 3. That lots of land occupied by any religious organization, incorporated or otherwise, conforming to the approved survey within the limits of such town site, shall be conveyed to or in trust for the same.

SEC. 4. That all lots not disposed of as hereinbefore provided for shall be sold, under the direction of the Secretary of the Interior, for the benefit of the municipal government of any such town, or the same, or any part thereof, may be reserved for public use as sites for public buildings, or for the purpose of parks, if in

the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

SEC. 5. That the provisions of sections four, five, six, and seven of an act of the legislature of the State (of) Kansas, entitled "An act relating to town sites," approved March second, eighteen hundred and sixty-eight, shall, so far as applicable, govern the trustees in the performance of their duties hereunder.

SEC. 6. That all entries of town sites now pending on application hereafter made under this act shall have preference, at the local land office, of the ordinary business of the office, and shall be determined as speedily as possible; and if an appeal shall be taken from the decision of the local office in any such case to the Commissioner of the General Land Office, the same shall be made special, and disposed of by him as expeditiously as the duties of his office will permit; and so if an appeal should be taken to the Secretary of the Interior. And all applications heretofore filed in the proper land office shall have the same force and effect as if made under the provisions of this act; and upon the application of the trustees herein provided for, such entries shall be prosecuted to final issue in the names of such trustees, without other formality; and when final entry is made, the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided.

SEC. 7. That the trustees appointed under this act shall have the power to administer

> oaths, to hear and determine all controversies arising in the execution of this act, shall keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same, and all conveyances executed by them shall be acknowledged before an officer duly authorized for that purpose. They shall be allowed such compensation as the Secretary of the Interior may prescribe, not exceeding ten dollars per day while actually employed, and such traveling and other necessary expenses as the Secretary may authorize, and the Secretary of the Interior shall also provide them with necessary clerical force by detail or otherwise.

Those portions of the demurrer which cover the point under consideration are stated as follows (Rec., p. 50):

> Second. Said defendants further demur to the complaint for the reason that this court has not jurisdiction of the subject of the action.
>
> Third. Said defendants further demur for the reason that this court has not jurisdiction of these defendants in their capacities as trustees of town site board No. 6 as set out in the complaint.

The learned counsel for appellants start out with the proposition that the patent of the United States conveying the land in question to the town-site trustees divested the United States of all of its right and title in and to the land; that except for the supervisory and

appellate control of the Commissioner of the Land Office and the Secretary of the Interior in the disposition of the lots platted from the land, the United States had remaining no interest whatever in the land, and could not be reinvested with the title to the same except through the intervention of a court of equity, by reason of some fraud, accident, or mistake in procuring the land to be patented to such trustees; and that as against a homesteader claiming the right to the land the town-site trustees were in every respect the holders of a private right or claim with full title to the land in question, subject to a decree of a resulting trust in said trustees in favor of a homesteader who could establish his rights in the courts to have the land decreed to rightfully belong to him.

We herewith give the text of the patent in this case, omitting the attestation and signatures, which are unnecessary:

> Whereas John Foster, W. S. Robertson, and A. C. Schnell, town-site board No. 6, assigned to West Guthrie, in Logan County, Oklahoma Territory, in trust for the several use and benefit of the occupants of the town site of West Guthrie, in said county and Territory, according to their respective interests, have deposited in the General Land Office of the United States a certificate of the register of the land office at Guthrie, Oklahoma Territory, whereby it appears that full payment has been made by the said John Foster, W. S. Robertson, and A. C. Schnell, trustees as aforesaid in trust as aforesaid, according to the provisions of the act of

Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands" and the acts supplemental thereto, including the act of May 14, 1890, for the west half of section eight, in township sixteen north, of range two west of Indian meridian, in Oklahoma Territory, excepting a reservation for park purposes, described as follows: (Commencing at a stake forty feet west and forty feet south of the northeast corner of the southwest quarter of the aforesaid section eight; thence south eighty-nine degrees and forty-one minutes west, six hundred and eighty feet to a stake; thence south one thousand and sixty feet to a stake; thence north eighty-nine degrees and forty-one minutes east, two hundred and seventy feet and eight-tenths to a stake; thence south thirty-seven degrees east, one hundred feet to a stake; thence south fifty-five degrees east, one hundred and seventy-five feet to a stake; thence south eighty-eight degrees east, two hundred and four feet and five-tenths to a stake; thence north twelve hundred and fifty feet to the place of beginning, containing seventeen acres and nine-tenths of an acre), said town site containing three hundred and two acres and one-tenth of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor-general, which said tract has been purchased by the said John Foster, W. S. Robertson, and A. C. Schnell, trustees as aforesaid, in trust as aforesaid.

Now, know ye, That the United States of America, in consideration of the premises and

> in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said John Foster, W. S. Robertson, and A. C. Schnell, trustees as aforesaid, in trust as aforesaid, and to their successors, the said tract above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said John Foster, W. S. Robertson, and A. C. Schnell, trustees as aforesaid, in trust as aforesaid, and to their successors and assigns in trust as aforesaid.

In reply to this theory, we think it proper to contend that under this Oklahoma town-site act the patent conveying to the trustees was merely the conveyance by authority of Congress of the title to the land from one set of officers of the United States to another for the purposes of administrative convenience, and that the real title was just as fully in the United States and its officers after such patent was executed and delivered as it was while the land remained strictly a part of the public domain. Or, stated in a different form, we understand appellant's contention to be that it is impossible in law that the United States can convey by such a patent and not absolutely divest itself of all title to the land, and hence that upon such conveyance as was made by this patent all title passed from the United States and vested absolutely in appellees.

To which we say that by the act of Congress machinery was provided whereby the United States could execute such a conveyance to its officers, the

town-site trustees, for certain purposes and those purposes only, and this, except for those purposes, leaves not only the title but the equitable interest in the lands combined in the United States and not in the trustees, so as to create an indefeasible title and private right in the latter. This doctrine was undoubtedly that contended for by the United States attorney in the court below, and entertained and adopted by the court below in holding the demurrer good.

The McDaid case is quoted from in the opinion of the court below, the judge using the following very applicable and pointed language of this court:

> They unquestionably in that regard acted as representatives of the Government (meaning the town-site trustees). As a matter of convenience the trustees were the instrumentality for the transmission of title in respect of lands disposed of to actual holders, while the Secretary, notwithstanding the patent, was the medium as to surplus lands, which he could not be if the legal title had definitely passed to the trustees by patent for the whole site. The trust upon which the title was held was to be discharged in accordance with the regulations, and was necessarily subject to the supervisory power of the Department of the Interior. The Government retains its connection by having the entry made by its own agents and the trust executed in the manner it directs. By the scheme of this act the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the Government until the rightful claimants and the undisposed surplus lands are ascertained.

In a long line of decisions this court has held, in substance and effect, that the action of the Department of the Interior, as an administrative arm of the Government, having in its keeping and under its control the public lands, must be held supreme and authoritative in all matters appertaining to their custody, control, and disposal; and that while the courts will not interfere with such authority while the lands belong to the United States, yet when they are disposed of in such a manner as to finally divest the United States of its title, so that such lands become the subject of a private right, then it is perfectly proper for a court of equity to assume jurisdiction in the premises and correct any wrong of a legal character which has occurred under the Government's administration, redress any wrongs of private parties, and dispose of the property according to the very right of the matter involved. Applying that doctrine to this case, it may be safely and properly conceded as possible that appellant may have rights which will, as against some one, be the subject of equitable jurisdiction of the courts. But the true question is, *When will the proper occasion arise?* We need not grope in the dark upon this point. This court more than thirty years ago, in a well-considered case, *Johnson* v. *Towsley* (13 Wall., 72), clearly and definitely stated the rule in an opinion delivered by Mr. Justice Miller, from which we quote at page 87:

> This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the

> Government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the Government and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public land, the party holding that title should hold absolutely as his own or as trustee for another, and we are satisfied that the relations thus established between the courts and the Land Department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law.

The time, then, is when the ownership of lands has assumed the nature of a *private right.*

The case of the *United States, ex rel. McBride*, v. *Schurz, Secretary of the Interior* (102 U. S., 402) does not seem to us to be analagous to this for the reason that there the Government had finally patented in such a way as to fully divest itself of all interest in the land in question, and in such a way as to create an absolute private right. Under such circumstances it was very properly held that the remedy, if any existed against the patentee, was in a court of equity. We do

not dispute this doctrine, which seems to be in entire consonance with that stated by Mr. Justice Miller in the Johnson-Towsley case above quoted from. The distinction is so plain and explicit that it seems difficult to confound or misunderstand the same.

The case of *Wilcox* v. *Jackson* (13 Pet., 498), quoted from appellant's brief, pages 11 and 12, simply goes to the same effect as our concession hereinbefore made, viz, that while the title of the land is in the United States, it is subject to the control of the proper Department having the care and custody of the public domain; but when the title has passed out of the United States, then courts of equity, either State or Federal, may take up and decide questions as to its rightful ownership.

The language quoted by counsel from the case of Emblen, 161 U. S., 52 (brief, p. 10), in nowise modifies the general doctrine we have contended for and in no sense adds strength to the contention of the appellant, and we repeat that we do not contend that if parties should obtain a regular patent from the United States, which has the effect to finally divest the United States of its title, that such parties can be pursued in a court of equity as holders of a resulting trust in favor of others holding a superior equitable right. But we repeat that the Emblen case has no tendency to establish the claim made by appellant in this case that the patent to the town-site trustees divested the United States of all title, and operated to create ownership in them as in private parties.

But it is asserted by appellant's counsel, in support of their contention that the title became absolutely vested as a private right in the trustees, that no provision for reversion to the United States was contained in the patent which issued to them. Under our view of that patent, such a condition was unnecessary, simply because the patent created a trust under a special act of Congress in the parties named as trustees and appointed *as officers of the Government*, and not a patent creating a private right. This view does not contradict the doctrine laid down in the case of *Van Wyck* v. *Knevalls* (106 U. S., 360). That was a case in which this court held that the act of Congress granting land in aid of railroads had the effect to vest the title *in presenti* in the railroad company upon filing its map of definite location, and in the event of any failure that it was necessary that judicial proceedings should be taken to reclaim the lands granted by the United States.

The case of the *Germania Iron Co.* (165 U. S., 379) has the same effect as the one last above quoted, but no greater, in its bearing upon the question here.

But some weight is claimed from the alleged fact that *Payne* v. *Robertson* (169 U. S., 323) was decided upon its merits, and that it was exactly like this case in the relative position of the parties. Indeed, the counsel for appellant claim that that case is decisive of this one for the reason last above stated. They claim that this court therein impliedly proceeded to hear and determine the case upon the merits of the controversy. But this contention is entirely without

weight when that case is examined. It is true that Payne claimed the land as a homestead; it is true that it was a part of this same town site; it is also true that the defendants were town-site commissioners; it is also true that the case was decided by the court upon demurrer, and that several grounds of demurrer were alleged. But the main and absolutely essential feature alleged by appellants here, namely, that the case was heard by this court *on its merits*, was wanting. That case was not heard upon its merits, but merely upon one ground of demurrer. Complainant there had stated affirmatively in his bill that he was in the Territory, and not on the outside, at 12 o'clock noon of the day when the President's proclamation threw down the fences and permitted the public to enter. He was one of the class expressly excluded from entering the lands under the homestead law by the President's proclamation. Having affirmatively stated *that* in his bill of complaint, and the demurrer having thereupon expressly questioned his rights, this court held against him upon that question and not at all upon the merits of the controversy. Further comment in respect to that case is unnecessary.

SHOULD THE TOWN-LOT CLAIMANTS HAVE BEEN JOINED AS PARTIES?

Counsel for appellants is correct in claiming that the first question is the main one, and that if the suit could not be maintained against appellees, as the supreme court of the Territory held, it is not material whether the claimants of the lots should or should not be made codefendants.

If the parties who settled upon this land and obtained rights to the lots embraced in the land in question thereafter obtained patents or deeds from the town-site trustees who are appellees here, undoubtedly their rights under such patents would relate back to the time when they settled upon and made claims to their respective lots. We are unable to understand why, even though they had not actually obtained deeds, they might not have been made parties defendant if they were known. Under the act of Congress they had equitable interests, even though such interests had not ripened into actual ownership by deed. We can not see any force in the claim made for appellant that it would not have been a hardship to ascertain who they were, because appellant was on the ground claiming the lands in question. There was not a great number of the claimants, and it is nowhere asserted in the record that it was impossible to have ascertained their names or the character and extent of their respective claimants. Mere difficulty in obtaining this information would not excuse failure to make them parties. The hardship, therefore, would have been only such as is often incident to the commencement of suits in equit · or actions at law, and can be no adequate excuse for appellant's failure in this regard.

We think there is nothing in the contention so strenuously made that the manner of pleading the demurrer of the appellees was insufficient because of the supposed requirements of the code of Oklahoma that a demurrer for want of parties must furnish the

name of parties supposed to be wanting. If it is true that the complaint by which this case was begun was filed under the code of Oklahoma, inasmuch as this case is purely one for equity jurisdiction, the complainant, who is appellant here, must have ignored the fact that the equity system is retained in the Federal courts. We think, therefore, that this case should have been commenced by the filing of a bill in equity and not by a complaint under the code, and if we are correct in this belief, we see no reason for the claim that merely by commencing the suit under the code the complainant could compel the defendants to comply with code procedure or code requirements in filing a demurrer to their complaint. Any form of demurrer which would be sufficient under equity pleading and practice must have been sufficient in this case, and as there is no rule in equity practice requiring a demurrer to be thus specific, the demurrer, as stated by appellees in this case, was ample to meet the requirements of the case.

The whole subject of the failure of parties is discussed so fully and thoroughly by the supreme court of Oklahoma in its opinion in this case, which opinion is transmitted with the record (pp. 58 to 67, inclusive), that it seems an unnecessary consumption of the time of the court and of labor upon the part of counsel to traverse this ground a second time. Such an effort would be an unnecessary addition to the volume of this case. Nor have we been able to discover in the brief of learned counsel for appellant any argument or

suggestion which in any way tends to add weight to the contention made by them in the court below respecting this question of their failure to join the proper defendants.

THE MERITS.

A large amount of space is given by counsel for appellant in their brief to the discussion of the merits of the case. This is upon the theory that this court may think it proper to pass upon the merits of the case. If we understand the record herein, the complaint was filed, and in the body of the same, or subjoined as exhibits, were the whole series of proceedings before the register and receiver, the Commissioner of the General Land Office, and the Secretary of the Interior. To this complaint a demurrer was filed by defendants. The complainant thereupon elected to stand upon the demurrer. Not a word of testimony has been taken in this suit. No attempt has been made by the lower court to pass upon the merits involved. It therefore seems strange that it should be contended that this court of last resort would proceed, in any event, to take up the case and pass upon its merits as shown in said complaint and exhibits without an opportunity upon the part of the appellees to answer over in the court below and proceed to a trial of any issues which might be framed, and the testimony and evidence which might be adduced under the answer which would probably, in such event, be filed.

The questions of fact in the case presented before the departmental officers, as shown by the exhibits,

must have been passed upon by such officers by whom the same were considered and they must have been passed upon adversely to claimants. No opportunity has been given the lower courts to decide whether there were errors of law made by the departmental officers. No answer was filed by appellees and therefore no argument was made by counsel upon the real merits of the controversy. And even the facts in the case, by such a trial as would necessarily occur upon an issue joined on the merits in the lower court, might be shown to be materially different from those presented by the testimony before the register and receiver of the land office. In short, we think the whole question would have to be carefully litigated *de novo* in the lower court before this court would assume to attempt a final decision of the case. We therefore refrain from attempting any argument upon the merits.

Respectfully submitted.

MARSDEN C. BURCH,
Special Assistant to the Attorney-General.

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Supreme Court of the United States.

No. 175.—October Term, 1902.

Henry H. Beckfinger, Appellant,
vs.
John W. Foster, W. S. Robertson and A. C. Schnell, Trustees of Townsite Board No. 6, Oklahoma Territory.

Appeal from the Supreme Court of the Territory of Oklahoma.

[June 1st 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

This case involves the construction of the act of Congress passed May 14th 1890, entitled "An act to provide for townsite entries of land in what is known as 'Oklahoma,' and for other purposes." 26 *Stat.* 109, c. 207.

As the purpose and scope of the act can be ascertained only by examining all of its provisions, it is here given in full:

"§ 1. That so much of the public lands situate in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as townsites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entry shall have been made the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees, including the survey of the land into streets, alleys, squares, blocks and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such townsite, costs of survey, conveyance of lots and other necessary expenses, including compensation of trustees: *Provided*, That the Secretary of the Interior may, when practicable, cause more than one townsite to be entered and the trust thereby created executed in the manner herein provided by a single board of trustees, but not more than seven boards of trustees in all shall be appointed for said Territory, and no more than two members of any of said boards shall be appointed from one political party.

"§ 2. That in the execution of such trust and for the purpose of the conveyance of title by said trustees, any certificate or other paper evidence

of claim duly issued by the authority recognized for such purpose by the people residing upon any townsite, the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be *prima facie* evidence of the claim of occupancy of the holder: *Provided*, That nothing in this act contained shall be so construed as to make valid any claim now invalid of those who entered upon and occupied said lands in violation of the laws of the United States or the proclamation of the President thereunder: *Provided further*, That the certificates hereinbefore mentioned shall not be taken as evidence in favor of any person claiming lots who entered upon said lots in violation of law or the proclamation of the President thereunder.

"§ 3. That lots of land occupied by any religious organization, incorporated or otherwise, conforming to the approved survey within the limits of such townsite, shall be conveyed to or in trust for the same.

"§ 4. That all lots not disposed of as hereinbefore provided for shall be sold, under the direction of the Secretary of the Interior, for the benefit of the municipal government of any such town, or the same, or any part thereof, may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

"§ 5. That the provisions of sections four, five, six and seven of an act of the legislature of the State (of) Kansas, entitled 'An act relating to townsites,' approved March second, eighteen hundred and sixty-eight, shall, so far as applicable, govern the trustees in the performance of their duties hereunder.

"§ 6. That all the entries of townsites now pending on application hereafter made under this act shall have preference, at the local land office, of the ordinary business of the office, and shall be determined as speedily as possible; and if an appeal shall be taken from the decision of the local office in any such case to the Commissioner of the General Land Office, the same shall be made special, and disposed of by him as expeditiously as the duties of his office will permit; and so if an appeal should be taken to the Secretary of the Interior. And all applications heretofore filed in the proper land office shall have the same force and effect as if made under the provisions of this act; and upon the application of the trustees herein provided for, such entries shall be prosecuted to final issue in the names of such trustees, without other formality; and when final entry is made, the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided.

"§ 7. That the trustees appointed under this act shall have the power to administer oaths, to hear and determine all controversies arising in the execution of this act, shall keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same, and all conveyances executed by them shall be acknowledged before an officer duly authorized for that purpose. They shall be allowed such compensation as the Secretary of the Interior may prescribe, not exceeding ten dollars per day while actually employed, and such traveling and other necessary expenses as the Secretary may authorize, and the Secretary of the Interior shall also provide them with necessary clerical force by detail or otherwise.

"§ 8. That the sum of ten thousand dollars or so much thereof as may be necessary is hereby appropriated to carry into effect the provisions of this act, except that no portion of said sum shall be used in making payment for land entered hereunder, and the disbursements therefrom shall be refunded to the Treasury from the sum which may be realized from the assessments made to defray the expense of carrying out the provision of this act." 26 *Stat.* 110, *c.* 207.

The complaint shows that the appellees are the Trustees of Townsite Board Number Six, duly constituted and appointed by the Secretary of the Interior, and assigned to the townsite of West Guthrie, Oklahoma Territory, and had acquired the legal title to the western half of section eight, of township sixteen, north of range two, in Logan County, in that Territory.

Bockfinger, claiming to have become entitled, under the homestead laws of the United States, to the southwest quarter of that land—which was embraced within the townsite boundary—brought this suit in a Territorial District Court against the appellees as Towsite Trustees. The relief sought was a decree that the Trustees hold the title in trust for his use and benefit, and be compelled to convey to him.

The defendants demurred to the complaint upon several grounds, among others upon the ground that the court had no jurisdiction of the subject of the action nor of the defendants in their capacity as Townsite Trustees. The demurrer was sustained, and the plaintiff, electing to stand on his complaint, the suit was dismissed. Upon appeal to the Supreme Court of the Territory, the decree of the District Court was affirmed.

The decisive question in the case is whether the plaintiff's claim to the land can be made the subject of a suit against the Townsite Trustees as such. Upon a careful scrutiny of the provisions of the act of 1890 we are of opinion that this question must be answered in the negative. The plaintiff asked a decree declaring that the title acquired by the Trustees under the act of Congress for the use of townsite occupants be held

in trust for and conveyed to him. But no such relief could have been granted if the title acquired by the Trustees was held by them in trust for the purposes of the act of Congress and if, in every substantial sense, so far as real ownership is concerned, the land still belonged to the United States.

That the title was so held by the Townsite Trustees is, we think, clear. They did not hold an indefeasible title as of private right with power to dispose of the land at will, but only as trustees for such occupants as should be ascertained, in the mode prescribed by the act of Congress, to be entitled to particular lots within the townsite boundary. The trust was not, in any sense, of a permanent character. Its creation by Congress was only a step towards the ultimate transmission of the title of the United States to occupants under the Township Act. The United States retained its hold on the land until the title by proper conveyances should pass absolutely from it or from its officers or agents, the Townsite Trustees, to such occupants. When an occupant thus acquired title, any one who claimed that he was entitled to the land could litigate the matter with the occupant in some court of competent jurisdiction; for, as between the United States and the occupant, the former had then parted with its title.

It is suggested that, under this view, many years might elapse before the person to whom, as occupant, the land was awarded could be sued by the person claiming a superior right to that acquired by the Townsite Trustees for the use and benefit of occupants. This is true, but it cannot alter the fact that, under the act of Congress, the title remained, in every essential sense, in the United States, until conveyed to the occupant. The United States, as the primary owner of the land, could prescribe the terms upon which it could be disposed of to occupants. A suit against the Townsite Trustees to compel them, without regard to the act of Congress, to convey to one who was not an occupant within the meaning of that act, was a suit to compel them to convey land which really belonged to the United States. Such a suit, it is plain, might defeat the execution of the act of Congress.

The general principle was fully stated in *Johnson* v. *Towsley*, 13 *Wall.* 72, in which this court, after observing that it had firmly refused to interfere with the Land Department in its administration of the public lands, *so long as the title was in the United States*, said: "On the other hand, it has constantly asserted the right of the proper courts to inquire, *after the title had passed from the Government, and the question became one of private right*, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own or as trustee for another."

This was the ground upon which the court proceeded in *McDaid* v. *Oklahoma*, 150 *U. S.* 209, in which case the question was as to the right of townsite trustees to withhold a deed pending an appeal to the Commis-

sioner of the General Land Office. In that case it became necessary to declare the scope and meaning of the act of 1890.

After referring to a decision of the Land Department, under the act of 1890, to the effect that "the issue of the patent to townsite trustees under the act was not a disposition of the Government title, but a conveyance in trust to be held under the direction of the Secretary of the Interior," the court in that case, speaking by Chief Justice Fuller, said: "This proposition is denied, and it is insisted that the authority of the Secretary relates solely to public lands, the title to which is still in the United States, and that by the issue of the patent to townsite trustees the title passes and all control over the lands embraced therein is lost. Hence that in this case the title of the United States passed by the patent to the trustees, and that they held it thereafter in trust for the occupants, free from the control of the Land Department. Reference is made to *Moore* v. *Robbins*, 96 *U. S.* 530, and like cases, to the point that when a patent has been awarded, issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the Executive Department of the Government. But those cases refer to the legal title directly and finally conferred, and the principle invoked can only be applicable on the assumption that by the townsite conveyance title was granted to the Oklahoma trustees for the purpose of divesting the Government of all authority and control over the final disposition of the property, and not for the purpose of putting title in the trustees as agents of the Government for the execution of the trust devolving upon them as such. Whether this assumption is justified or not must depend upon the terms and true construction of the act of May 14th 1890."

The court then examined the several sections of the act of 1890, and proceeded: "In the light of these provisions we perceive no reason for doubting that the trustees appointed by the Secretary under the act, and whose compensation and expenses were fixed by him, were agents of the Government for the purpose of carrying out the trust thereby created to the extent and as specified, and this included the ascertainment of the beneficiaries in the first instance and the transfer of the title to them. While on the final entry the title of the United States was to be conveyed to the trustees, such conveyance was explicitly declared as made 'for the uses and purposes in the act provided,' and among these uses and purposes was the determination of controversies between contesting claimants by the trustees, who were to administer oaths, pass on evidence, and keep a record of their proceedings, to be deposited in the Land Department. They unquestionably acted in that regard as the representatives of the Government, and their decisions were properly subject to that appeal to the Commissioner and the Secretary, for which the Secretary's regulations provided. As matter of convenience, the trustees were the instrumentality

for the transmission of title in respect of lands disposed of to actual holders, while the Secretary, notwithstanding the patent, was the medium as to surplus lands, which he could not be if the legal title had definitively passed to the trustees by the patent for the whole site. The result is the same if the fourth section be construed as directing the Secretary to cause the trustees to execute the conveyance therein referred to. The trust upon which the title was held was to be discharged in accordance with the regulations, and was necessarily subject to the supervisory power of the Department of the Interior. Section 2387 of the Revised Statutes confirms this view, for the townsites there referred to were to be entered by the corporate authorities of the town, if incorporated, or, if not, by the judge of the county court for the county in which the town was located, and the trust as to the disposal of the lots and proceeds of the sales thereof was to be executed in accordance with such regulations as might be prescribed by the legislative authority of the State or Territory in which the town might be situated, while under this special act, in reference to Oklahoma, the entry was to be made by trustees appointed by the Secretary and the trust conducted under such regulations as might be established by him. In the one case the Government parted with its connection with the land when the patent issued to the local authority; in the other, the Government retains its connection by having the entry made by its own agents, and the trust executed in the manner it directs. By the scheme of this act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the Government until the rightful claimants and the undisposed of or surplus lands are ascertained."

It is suggested that the question in the *McDaid* case was not the same as the one now under consideration. That is true, but the decision in that case required the court to determine the meaning of the act of Congress of 1890; consequently, what was said in the *McDaid* case as to the scope of the act is pertinent here.

Several cases were cited in argument as sustaining such a construction of the act of Congress as would authorize a suit like this. We allude to *In re Emblen*, 161 *U. S.* 52, 56; *Germania Iron Co.* v. *United States*, 165 *U. S.* 379; and *Payne* v. *Robertson*, 169 *U. S.* 323.

In *Emblen's* case it appeared that pending a contest before the Secretary of the Interior between Emblen and Weed as to whom a patent should be issued for a tract of land in Colorado, Congress passed an act confirming Weed's entry and directing that a patent issue to him, which was done. Then Emblen sought by mandamus to compel the Secretary to rehear the case, and to decide the issue between him and Weed, independently of the act of Congress, which was alleged to be unconstitutional. This court, speaking by Mr. Justice Gray, said: "Such being the state of the case, it is quite clear that (even if the act of Congress was unconstitutional, which

we do not intimate) the writ of mandamus prayed for should not be granted. The determination of the contest between the claimants of conflicting rights of pre-emption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the Land Department, and cannot be controlled or restrained by mandamus or injunction. After the patent has once been issued, the original contest is no longer within the jurisdiction of the Land Department. The patent conveys the legal title to the patentee; and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor. All this is clearly settled by previous decisions of this court, including some of those on which the petitioner most relies"—citing *Johnson* v. *Towsley*, 13 *Wall.* 72; *Moore* v. *Robbins*, 96 *U. S.* 530; *Marquez* v. *Frisbie*, 101 *U. S.* 473; *Smelting Co.* v. *Kemp*, 104 *U. S.* 636; *Steel* v. *Smelting Co.*, 106 *U. S.* 447; *Monroe Cattle Co.* v. *Becker*, 147 *U. S.* 47; *Turner* v. *Sawyer*, 150 *U. S.* 578, 586. So far from militating against the doctrine of the *McDaid* case, the above observations sustain the views there expressed. The patent referred to in the *Emblen* case was a formal, regular patent, designed to pass the title of the United States, and to invest the patentee with all the rights of the United States in the land.

In *Germania Iron Co.* v. *United States*, 165 *U. S.* 379, 383, the question was whether the court could by decree, in a writ brought by the United States, cancel a patent that had been issued by inadvertence and mistake, and thereby restore the jurisdiction of the Land Department to determine such disputed questions of fact as involved the title to the land patented. That suit was maintained and the patent was cancelled. It is clear that the decision has no bearing on the question now before us.

In *Payne* v. *Robertson* the question as to the right to maintain a suit directly against the Townsite Trustees for the purpose of divesting them of the title to the land in dispute does not appear to have been raised by the parties; it certainly was not decided by the court. The sole question, the court took care to say, was whether by reason of his entry into the Territory, and his presence there, under the circumstances stated, the plaintiff, who was a deputy marshal of the United States, was disqualified from making a homestead entry immediately upon the lands being opened for settlement. The court held against the plaintiff on that point, and that being conclusive of the case, the judgment of this court was placed entirely upon that ground. It was not necessary to go farther and decide the question here presented.

Nor is there anything in *Wilcox* v. *Jackson*, 13 *Pet.* 498, and *United States* v. *Schurz*, 102 *U. S.* 402, at all in conflict with the decisions in the above cases. Both the *Wilcox* and *Schurz* cases recognize the principle that after the title to public lands has passed from the United States, that is, after

the Land Department has performed the last act in the series necessary to pass the title of the Government, the courts will, as between parties asserting conflicting rights in such lands, determine, by appropriate judicial proceedings, which of the parties has the better right. But those cases equally recognize the principle that the courts will not interfere with the Land Department in its control and disposal of the public lands, under the legislation of Congress, so long as the title in any essential sense remains in the United States.

Without further reference to authorities, we adjudge that until the title to lands within any townsite boundary has been finally disposed of as provided in the act of 1890, no suit can be maintained against the Townsite Trustees to divest them of the title held by them in trust for occupants under that act; although a townsite occupant, after receiving title under the act, may be sued by any one claiming to have acquired under the homestead laws a right to the lands prior and superior to that held by the Townsite Trustees for the use and benefit of townsite occupants.

The decree of the Supreme Court of Oklahoma is

Affirmed.

Mr. Justice WHITE dissented.

Mr. Justice MCKENNA did not hear the argument of this case nor participate in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.